Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

STATE OF OKLAHOMA,
COMMISSIONERS OF THE LAND OFFICE,

Petitioner,

v.

RANDY L. CROOK
and
JOHN WEDMAN
and
UNITED STATES OF AMERICA,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the *Ex parte Young* "exception" to the Eleventh Amendment's jurisdictional bar authorizes *any form* of federal-court relief against an unconsenting State, *when that State is not alleged to have violated either federal statute or the United States Constitution*?

II. Whether 11 U.S.C. § 106(c) authorizes Chapter 12 bankruptcy relief against a State, where, *inter alia*, the provisions governing the contents, filing, modification and confirmation of, and discharge pursuant to, a Chapter 12 plan contain none of the words necessary to "trigger" the operation of 11 U.S.C. § 106(c)?

III. Whether 11 U.S.C. § 106(c) authorizes bankruptcy relief against a State where the resultant loss is legally required to be compensated from funds in the State treasury, and if so, whether that result is constitutionally foreclosed by the teachings of *Edelman v. Jordan* and its progeny?

IV. Whether a "failure of the national political process" of sufficient dimension has occurred herein so as to constitute a violation of the Tenth Amendment?

PARTIES BELOW

All parties below are identified in the caption to this Petition, and continue to be parties before this Court.

Respondents Randy L. Crook and John Wedman successfully sought Chapter 12 bankruptcy relief against Oklahoma (despite Oklahoma's jurisdictional objections) below. Since, depending on the interpretation which it is given, the instant suit involves a potential challenge to the constitutionality of 11 U.S.C. § 106(c), the courts below certified to the Attorney General, pursuant to 28 U.S.C. § 2403(a), the fact that the constitutionality of an Act of Congress was drawn into question.

After having been given proper notice as required by 28 U.S.C. § 2403(a), respondent United States of America intervened as a party, in support of respondents Crook and Wedman, below. The United States of America argued and briefed the case before the United States Court of Appeals for the Tenth Circuit; respondents Crook and Wedman adopted that brief *in toto*, and submitted no independent briefs of their own.

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PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, which resolved all the consolidated appeals at that level, is not yet reported, and appears in the Appendix to this Petition, at A1-A15.

The opinion of the United States District Court for the Western District of Oklahoma, which resolved all the

consolidated appeals at that level, is unreported, and appears in the Appendix to this Petition, at B1-B12.

The final order of the United States Bankruptcy Court for the Western District of Oklahoma as relates to respondent Randy L. Crook, which rejected Oklahoma's jurisdictional objection, is unreported, and appears in the Appendix to this Petition, at C1-C17.

The earlier order of the United States Bankruptcy Court for the Western District of Oklahoma, which confirmed the amended Chapter 12 plan of respondent Randy L. Crook subject to Oklahoma's jurisdictional objection, is unreported, and appears in the Appendix to this Petition, at D1-D5.

The final nunc pro tunc order of the United States Bankruptcy Court for the Western District of Oklahoma as relates to respondent John Wedman, which rejected Oklahoma's jurisdictional objection, is unreported, and appears in the Appendix to this Petition, at E1-E2.

The earlier order of the United States Bankruptcy Court for the Western District of Oklahoma, which confirmed the Chapter 12 plan of respondent John Wedman subject to Oklahoma's jurisdictional objection, is unreported, and appears in the Appendix to this Petition, at F1-F8.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Tenth Circuit was filed on May 12, 1992. This

Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The full text of Article III, section 2, paragraph 1 of the United States Constitution, and the Tenth and Eleventh Amendments thereto, are set forth in the Appendix to this Petition, at I1.

STATUTORY PROVISIONS INVOLVED

The full text of 11 U.S.C. § 106, 11 U.S.C. § 1221, 11 U.S.C. § 1222, 11 U.S.C. § 1223, 11 U.S.C. § 1224, 11 U.S.C. § 1225, and 11 U.S.C. § 1228 are set forth in the Appendix to this Petition, at J1-J9

STATEMENT OF THE CASE

The Commissioners of the Land Office [CLO], an instrumentality of the State of Oklahoma, administers the trust consisting of lands and funds granted to the State by the Oklahoma Enabling Act. The beneficiaries of this trust are the school children of Oklahoma and its universities and public buildings. CLO is charged with the lease, sale, and management of trust lands and the proceeds derived therefrom.

At various times, respondents Crook and Wedman borrowed such funds, secured by first mortgages on real property within the State. Both debtors defaulted and sought Chapter 12 bankruptcy relief, including "write-downs" of the amounts due, downward adjustments in

the applicable interest rates, and extensions of the terms of the notes. Oklahoma filed no proof of claim in any of the cases below, and the bankruptcy court awarded such relief over Oklahoma's continuing jurisdictional objection. These facts appear in the record now held by the United States Court of Appeals for the Tenth Circuit. *See* Appellant's Appendix (Tenth Circuit), *filed* July 18, 1991, at 4-5, 19 (Chapter 12 plans of Crook and Wedman); *id.* at 44-79 (confirmation of plans); *id.* at 38-43 (stipulations below); Appellee United States' Supplemental Memorandum (Tenth Circuit), *filed* Oct. 26, 1991, at Attachment 1-2 (copies of original amortization notes, containing their terms). The court of appeals correctly concluded that "[t]he facts in these consolidated cases are undisputed and identical in all material respects." *Infra* at A4.

On appeal, the bankruptcy court's exercise of jurisdiction was affirmed by the United States District Court for the Western District of Oklahoma, and by the United States Court of Appeals for the Tenth Circuit.

With respect to Oklahoma's contention (reflected by the first Question Presented to this Court) that the "stripping doctrine" of *Ex parte Young*, 209 U.S. 123, 159-60 (1908), did not apply to circumstances in which no violation of federal law was (or could be) alleged, the court of appeals reasoned that any attempt by the State to enforce its original notes *subsequent to* the exercise of bankruptcy jurisdiction *might, in the future*, "constitute a wrongful act of the type contemplated in the teachings of *Ex parte Young*." *See infra* at A12. Moreover, it concluded, the absence of a federal violation by virtue of which a "stripping" of official State authority (and consequent Eleventh Amendment immunity) could be effectuated was a technical matter only, since "[t]he line of cases begun in *Ex*

parte Young is not concerned so much with righting wrongs as with the relations between sovereigns in our federal system." *See infra* at A13.

With respect to Oklahoma's contention (reflected by the second Question Presented to this Court) that 11 U.S.C. § 106(c) does not authorize bankruptcy relief against States in Chapter 12 cases, since, *inter alia*, the provisions governing the filing, contents, confirmation, and modification of Chapter 12 plans (enacted subsequent to section 106(c)) do not contain any of that section's "trigger words," the court of appeals treated Chapter 12 identically with other bankruptcy chapters ..hose relevant provisions *do* contain the "trigger words." It then reasoned that *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 102 (1989), had effectively resolved the interpretive conundrum surrounding 11 U.S.C. § 106(c). *See infra* at A11-A12. In so doing, it gave short shrift to the interpretive uncertainties (apart from the retroactive-money-damages issue) expressed by seven members of this Court, with respect to 11 U.S.C. § 106(c), only two weeks prior to the oral argument before the court of appeals herein. *Compare United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1014-16 (1992) *with infra* at A12. This Court's expressed uncertainties concerning the meaning of that statute were discussed in some detail at oral argument.

With respect to Oklahoma's contention (reflected by the third Question Presented to this Court) that the existence of a State and federally-mandated obligation to recompense the trust for all losses, out of funds in the state treasury, moved the instant facts closer to *Edelman v. Jordan*, 415 U.S. 651 (1974), than *Ex parte Young*, the court of appeals reasoned that the relief awarded below is

"declaratory and injunctive in nature." *Infra* at A11. *See also infra* at A3-A4.

Finally, with respect to Oklahoma's contention (reflected by the fourth Question Presented to this Court) that a substantial failure of the national political process had occurred herein, and that that failure was judicially cognizable for Tenth Amendment purposes pursuant to *South Carolina v. Baker*, 485 U.S. 505, 512-13 (1988), the court of appeals reasoned that while this Court, in *Baker*, "allowed that such a failure might warrant relief under the Tenth Amendment, . . . [it] articulated no test." *Infra* at A15. It then concluded that the mere fact that 11 U.S.C. § 106(c) was passed as a floor amendment was insufficient to establish a Tenth Amendment delict. *See id.*[1]

Federal jurisdiction in the first instance herein was exercised by the United States Bankruptcy Court for the Western District of Oklahoma pursuant to 28 U.S.C. § 157(a) and 28 U.S.C. § 1334. Petitioner Oklahoma objected to the exercise of jurisdiction by that court at all stages of the litigation below, and pursues that objection before this Court.

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[1] In the "Reasons for Granting the Writ" section of this Petition which immediately follows, Oklahoma will maintain that the court of appeals fundamentally mischaracterized, and consequently failed to come to grips with, the nature and specificity of its Tenth Amendment contention.

Oklahoma will further maintain hereinafter that the court of appeals' statement of the issues presented to that court, *see infra* at A7, fundamentally oversimplified and/or mischaracterized the nature and focus of its statutory and Eleventh Amendment analysis.

REASONS FOR GRANTING THE WRIT

Oklahoma respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit.

This Court should grant the Writ for both of the reasons articulated by Rule 10.1(c) of this Court. Before addressing the Questions Presented in greater detail, Oklahoma will provide a brief overview of each, with particular attention to the considerations described by Rule 10.1(c).

With respect to the first Question Presented (relating to the ability of federal courts to apply *Ex parte Young*'s "stripping doctrine" to situations in which a State is not in arguable violation of federal law), the court of appeals, holding in the affirmative, extended the reach of *Ex parte Young* to situations never authorized by this Court. Moreover, it did so in a manner directly conflicting with this Court's recent teachings in *Cory v. White*, 457 U.S. 85, 88-91 (1982), which applied a limitation on *Young*'s reach of long historical lineage. *See, e.g., Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937). It suffices to note at this juncture that the potential exercise of federal jurisdiction over an unconsenting State – *let alone a State which has engaged in no arguable federal delict* – is a matter of vital importance to the American system of federalism,[2] and a

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[2] *See, e.g.*, THE FEDERALIST No. 81, at 487-88 (A. Hamilton) (C. Rossiter ed. 1961) (noting "alarm" at the prospect of unconsented federal jurisdiction over States subsequent to the drafting of Article III, and responding thereto); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555-57 (J. Elliot ed. 1886 & photo. reprint 1941) (then-delegate and later

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matter whose implications vastly transcend the subject matter of the instant case.

With respect to the second Question Presented (relating to both the interpretation of 11 U.S.C. § 106(c) and its applicability to Chapter 12), it may be noted that this Court, twice in the last four Terms, has grappled with the meaning of that opaque and hastily-drafted (though critically important) provision. *See United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015-16 (1992); *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 101-03 (1989). Since those cases involved the award of direct monetary relief against the United States and a State, respectively, and since this Court concluded that 11 U.S.C. § 106(c) failed to satisfy the apposite federal sovereign immunity and Eleventh Amendment waiver and abrogation tests, they did not present this Court with the opportunity to interpret that provision definitively.[3] The

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Chief Justice John Marshall noting similar concerns at the Virginia ratifying convention, and responding thereto); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985) (noting that "[t]he Constitution never would have been ratified" had not appropriate assurances regarding unconsented federal jurisdiction been forthcoming); *Welch v. Dept. of Highways*, 483 U.S. 468, 484 (1987) (noting swiftness and hostility of reaction to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)); *Atascadero*, 473 U.S. at 239 n.2 (finding that "Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution").

[3] Indeed, Justice Scalia, writing for seven members of this Court in *Nordic Village*, proffered two conceivable (but conflicting) interpretations, 112 S.Ct. at 1015-16, and noted that "[t]he foregoing are assuredly not the only readings of subsection (c)

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instant case, which *does*, offers this Court the opportunity to give not only to States, but to *all* governmental entities whose creditor status in bankruptcy proceedings subjects them to the potential operation of that provision, critically needed guidance regarding their legal rights and the prospective conduct of their financial affairs. The unresolved issue surrounding the meaning of 11 U.S.C. § 106(c) cries out for uniform national resolution, and therefore presents an important federal question which should be settled by this Court.

The third and fourth Questions Presented, Oklahoma is well aware, appear at first blush to be factbound. Further analysis, however, will reveal that such is not the case.

To be sure, the third Question Presented is the product of an unusual situation in which the award of facially prospective relief (which, if purely prospective, and *assuming* the applicability of *Ex parte Young* to states not in arguable violation of federal law, is facially authorized by that case) carries with it – as a matter of both state and federal law – an inevitable depletion of State coffers absent the existence of any federal delict. To the extent that such consequence is a product of the Oklahoma Constitution and the Oklahoma Enabling Act, the issue *is* factbound. But this Court has long noted that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." *Edelman v. Jordan*, 415 U.S. 651, 667 (1974). The instant

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. . . . " *Id.* at 1016. *See generally infra* at 18-21 (discussing interpretive problems surrounding § 106(c)).

case presents this Court with the opportunity to render that broadly applicable distinction with greater clarity.

The fourth Question Presented, even assuming the continued viability of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985),[4] raises the issue whether a failure in the national political process, judicially cognizable pursuant to *South Carolina v. Baker*, 485 U.S. 505, 513 (1988), occurred on the instant facts. Once again, due to the inherent nature of Tenth Amendment argumentation after *Garcia* (which requires particularized analysis of whether a State has been "deprived of any right to participate in the national political process," or "singled out in a way that left it politically isolated and powerless," *Baker*, 485 U.S. at 513), Oklahoma's analysis, presented *infra* at 27-29, initially appears factbound. But if *Garcia*'s basic thrust continues to be sustained, no option is left to States seeking *judicial* Tenth Amendment relief save for particularized, fact-intensive argumentation. Moreover, the need for vital national guidance from this Court with respect to this matter is revealed, *inter alia*, by the court of appeals' opinion below: "[While the Supreme] Court allowed that . . . [an extraordinary failure in the national political process] might warrant relief under the Tenth Amendment, . . . [it] articulated no test." *Infra* at A15. Oklahoma believes that this Court presented the nucleus of a two-part Tenth Amendment test in *Baker*, with the first prong focusing on deprivation of a State's right to meaningfully participate in the national political process,

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[4] Oklahoma maintained below, and maintains herein, that *Garcia* is "unworkable and badly reasoned," see *Payne v. Tennessee*, 111 S.Ct. 2597, 2609 (1991) and should be overruled. *See infra* at 25-27.

and the second, on practical political factors which may leave a State "politically isolated and powerless." *See Baker*, 485 U.S. at 513. Nevertheless, the court of appeals' opinion, the wide range of scholarly opinion regarding the issue following *Baker*, and the necessity for States (and other parties) to clearly understand the constitutional nature of the State role in our system of federalism unequivocally suggest the need for further guidance from this Court. The facts of *New York v. United States*, 112 S.Ct. 2408 (1992), did not present this Court with the opportunity to give definitive guidance with respect to the principle suggested by *Baker*;[5] the instant controversy does.

Oklahoma will now address each of the four Questions Presented in greater detail.

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[5] *New York v. United States*, 112 S.Ct. at 2420:

> Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws . . . . This case presents no occasion to apply or revisit the holdings of any of those cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties.

I. IN UPHOLDING THE EXERCISE OF UNCONSENTED FEDERAL JURISDICTION OVER A STATE WHICH WAS NOT (AND CANNOT) BE ALLEGED TO BE IN VIOLATION OF EITHER FEDERAL STATUTE OR THE UNITED STATES CONSTITUTION, THE COURT OF APPEALS EXTENDED THE *EX PARTE YOUNG* FICTION TO CIRCUMSTANCES NEVER AUTHORIZED BY THIS COURT, AND DID SO IN A MANNER MANIFESTLY IN CONFLICT WITH RECENT PRONOUNCEMENTS BY THIS COURT.

Federal jurisdiction was exercised below without any allegation that Oklahoma was in violation of federal law or the United States Constitution. Nor could such an allegation have been made, since the only material conduct engaged in by the State was the loaning of trust funds, secured by mortgages, to Respondents Crook and Wedman, and otherwise administering the trust. In short, when federal jurisdiction was first exercised below, at all stages of the appeals, and indeed, *as Oklahoma comes before this Court*, it has engaged in no – even arguable – federal delict. Yet the court of appeals found the case to be controlled by *Ex parte Young*, 209 U.S. 123 (1908). *See infra* at A3-A4; A8-A13.

To be sure, *Young* found that a "stripping" of official State authority, sufficient to neutralize the Eleventh Amendment's jurisdictional bar, could occur where State conduct was in arguable violation of the United States Constitution. In so holding, the *Young* Court reasoned:

> The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not

> affect the State in its sovereign or governmental capacity.

209 U.S. at 159. Subsequent caselaw has established that *Young* also applies where State action is alleged to be in violation of federal statute. *E.g., Quern v. Jordan*, 440 U.S. 332 (1979). But beyond these limits, "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984).

That the existence of an arguable federal delict is a constitutional prerequisite to the exercise of *any form*[6] of unconsented federal jurisdiction over States was established by this Court over fifty years ago. *See Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937). *Worcester* was, of course, decided well before *Edelman v. Jordan*, 415 U.S. 651 (1974). Eight years after *Edelman*, this Court addressed the question whether *Edelman* "had silently, but effectively, overruled *Worcester*," *Cory v. White*, 457 U.S. 85, 88 (1982), and decided that it had not. *Id.* at 91. In rejecting any such contention, this Court, per Justice White, provided guidance so definitive regarding the proper scope of *Young*, and so germane to the instant facts, that it warrants *verbatim* quotation:

> We are unpersuaded by this view of *Edelman* . . . . The case was against individual officers who allegedly were violating federal law, and it *therefore* fell outside the reach of the Eleventh Amendment under *Ex parte Young* . . . .

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[6] The principle relied upon by Oklahoma at this juncture applies not only to retroactive monetary relief of the sort precluded on other grounds by *Edelman v. Jordan*, 415 U.S. 651 (1974), but also to the purely prospective relief contemplated by *Young*.

> *Edelman* did not hold . . . that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought . . . . The dissent mischaracterizes *Edelman* as asserting that the Eleventh Amendment bars "only" suits seeking money damages. *Edelman* recognized the rule "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment," *but never asserted that such suits were the only ones so barred* . . . .
>
> Neither did *Edelman* deal with a suit naming a state officer as a defendant, *but not alleging a violation of either federal or state*[7] *law*. . . . Edelman *did not hold that suits against state officers who are not alleged to be acting against federal or state*[8] *law are permissible under the Eleventh Amendment if only prospective relief is sought.*

Cory, 457 U.S. at 90-91 & n.2 (citations and footnote call omitted) (emphasis added).

The first and third paragraphs from *Cory* quoted immediately above evidence with unmistakable clarity that the commission of a federal delict is a constitutional prerequisite to the applicability of *Young*. Justices Powell, Marshall, and Stevens, who *dissented* in *Cory*, expressly recognized that fact. *Cory*, 457 U.S. at 96 (Powell, J., dissenting).

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[7] Subsequent to *Cory*, this Court recognized an Eleventh Amendment bar to unconsented suits based on state law against entities protected by that amendment. *Pennhurst*, 465 U.S. at 117-21. Thus, the "or state" reference in *Cory* is now obsolete.

[8] See *supra* note 7.

Having addressed the no-federal-delict issue in some detail in its Brief-in-Chief below, Oklahoma devoted ten pages of its reply brief at the court of appeals level to the argument surrounding *Cory*, reemphasizing the point at oral argument. *See* Appellant's Reply Brief (Tenth Circuit), *filed* Oct. 16, 1991, at 4-14. But the court of appeals, eschewing a single citation to *Cory*, took comfort from *Pennhurst*'s general statement that "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Infra* at A13 (quoting *Pennhurst*, 465 U.S. at 105). What the court of appeals did *not* note was that "the *Young* doctrine" did not authorize relief absent federal delict, nor did *Pennhurst*, from which that court quoted; or that *Cory* had expressly recognized that fact; or that the hypothetical possibility of federal delicts by states *in futuro* was equally present in *Cory*,[9] but this Court gave no weight whatsoever to that fact; or that the same *Pennhurst* opinion from which it took comfort had stated only three pages earlier: "While the rule permitting suits *alleging conduct contrary to* 'the supreme authority of the United States' has survived, *the theory of* Young *has not been provided an expansive interpretation.*" *Pennhurst*, 465 U.S. at 102 (emphasis added).

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[9] Absent the federal jurisdictional exercise which the Court rejected in *Cory*, either California, or Texas, or both (since the administrator of the estate claimed that the decedent was a domiciliary of Nevada) *might*, hypothetically and *in futuro*, have levied inheritance taxes on the estate of the late Howard Hughes without a taxation nexus adequate to satisfy the due process clause of the Fourteenth Amendment.

Navigating rapidly into uncharted waters, the court of appeals reasoned that any attempt by the State to enforce its mortgage rights *subsequent to* the exercise of federal jurisdiction *might, in the future* "constitute a wrongful act of the type contemplated in the teachings of *Ex parte Young*." *See infra* at A12. Eschewing citation to *any authority whatsoever* (excepting the general, out-of-context, and inapposite citation to *Pennhurst* quoted above) it concluded that the *possibility* of *future* illegal[10] conduct was sufficient to invoke *Ex parte Young*'s exception to Eleventh Amendment immunity.[11]

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[10] Even the court of appeals' reasoning concerning speculative future federal delicts by Oklahoma is deficient and circular. While, assuming the *valid* exercise of bankruptcy jurisdiction below, such acts (assuming their existence *in futuro*) would violate federal bankruptcy law, a vital linchpin in the court of appeals' reasoning *assumes the conclusion* that the exercise of such unconsented federal jurisdiction would be valid, *when that is the precise issue presented by this case.*

[11] The consequences of the inapplicability of *Young* are clear. While *Dugan v. Rank*, 372 U.S 609 (1963), was a *federal* immunity case, that case established a four-part general sovereign immunity test, *id.* at 620 (emphasis added) (citations omitted) ("[A] suit is against the sovereign in 'the judgment sought would *expend itself on the public treasury* or domain, or *interfere with the public administration*,' or if the . . . effect of the judgment would be 'to *restrain* the government from acting, or . . . to *compel* it to act.'"), which this Court has made applicable to *States* in cases where *Young* is inapplicable. *Pennhurst*, 465 U.S. at 101 n.11. Oklahoma argued below that since *Young* was inapplicable absent federal delict, the *Dugan* test – through *Pennhurst* – should control the State's immunity from suit, and that it could satisfy *each* of *Dugan*'s four prongs (though that test is articulated in the disjunctive). *See*

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Expanding the sweep of *Ex parte Young* to circumstances in which a State has committed no federal delict but might, hypothetically, in the future has enormous and potentially devastating consequences to American federalism. This Court has recently taught that while the benefits of our federal structure have been extensively catalogued in caselaw and the legal literature, its

> task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. "The question is not what power the federal Government ought to have but what powers in fact have been given by the people."

New York v. United States, 112 S.Ct. 2408, 2418 (1992) (citation omitted). Endorsing that premise *in haec verba*, Oklahoma does not believe that the powers given by the people extend to the exercise of unconsented federal jurisdiction over States which are not (nor can be) alleged to be in violation of federal law. If Oklahoma's analysis of this vital federalism issue is incorrect, it respectfully submits, this Court, upon full consideration, should render that judgment, not the United States Court of Appeals for the Tenth Circuit, in a cursory, conclusory opinion bereft of a single shred of relevant authority.

(Continued from previous page)

Appellant's Reply Brief (Tenth Circuit), *filed* Oct. 16, 1991, at 13-17. But in confusing analysis which seemed to treat Oklahoma's *Dugan* contention as utterly distinct from its position regarding the inapplicability of *Young*, *see infra* at A13-A14, the court of appeals utterly misapprehended the point.

II. THE DECISION OF THE COURT OF APPEALS TO APPLY 11 U.S.C. § 106(c) TO CHAPTER 12 BANKRUPTCY CASES, DESPITE THE ABSENCE OF THE "TRIGGER WORDS" PROVIDED BY 11 U.S.C. § 106(c)(1) IN RELEVANT CHAPTER 12 PROVISIONS, PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, BUT SHOULD BE, SETTLED BY THIS COURT.

While Oklahoma will maintain that in one respect, *see infra* at 19-20, the court of appeals' decision is in conflict with this Court's pronouncements on the meaning of 11 U.S.C. § 106(c), see *infra* at J1 (quoting statute), the gravamen of its reasoning as to why this Court should grant the Writ on this issue focuses on the need for national guidance concerning the proper interpretation of that provision.

This Court has grappled with – but not definitively resolved – the interpretive issues surrounding 11 U.S.C. § 106(c) twice in recent years. *See United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015-16 (1992); *Hoffman v. Connecticut*, 492 U.S. 96, 102 (1989). In *Hoffman*, this Court "construe[d] § 106(c) as not authorizing monetary recovery from the States." 492 U.S. at 102. In *Nordic Village*, it concluded that § 106(c) does not establish "an unequivocal textual waiver of the "[United States'] immunity from a bankruptcy trustee's claims for monetary relief." 112 S.Ct. at 1017. Both cases' *holdings* were manifestly confined to what § 106(c) does *not* provide.

To be sure, in reaching those conclusions, this Court tendered suggestions as to how § 106(c) might be interpreted. In *Hoffman*, it stated that "[t]he language of § 106(c)(2) is more indicative of declaratory and injunctive relief than of monetary recovery." 492 U.S. at 102. In

Nordic Village, this Court proffered two potential interpretations (one of which reads § 106(c)(1) and § 106(c)(2) as independent, the other not), 112 S.Ct. at 1015-16, and noting that "[t]he foregoing are not the only readings of subsection (c)," *id.* at 1016, did not (since it did not need to) interpret that provision definitively.

But irrespective of whether § 106(c)(1) and § 106(c)(2) are read as complementary or as independent, one thing which does seem clear – both from the statutory text and from this Court's pronouncements in *Nordic Village* – is that the presence of one or more of § 106(c)(1)'s "trigger words" ("creditor," "entity," or "governmental unit") in a provision of the bankruptcy code is an absolute precondition to the applicability of that provision. Should the "complementary interpretation" be adopted, the "trigger words" would identify the "subject matter of disputes" that bankruptcy courts could entertain. *Nordic Village*, 112 S.Ct. at 1015. Should the "independent interpretation" be adopted, then "provisions *using the trigger words* would apply fully to governmental units," *id.* at 1016 (emphasis added), subject to the "[e]xcept as provided in subsections (a) and (b)" proviso of 11 U.S.C. § 106(c). *Id.* This Court has demonstrated a reluctance to extend § 106(c) to the infinite, having noted that even with the limitations established by the "trigger words" (such as they are), "§ 106(c) would apply in a scattershot fashion to over 100 Code provisions." *Hoffman*, 492 U.S. at 102. Thus, to the extent described in this paragraph, Oklahoma submits that the court of appeals *sub silentio*[12] decision to treat

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[12] Although the issue was fully briefed to the court of appeals, *see* Appellant's Consolidated Opening Brief (Tenth

(Continued on following page)

Chapter 12 identically, for purposes of applying § 106(c), with other bankruptcy chapters whose relevant provisions *do* contain the trigger words, is in conflict with relevant teachings of this Court.[13]

Other interpretive problems abound with respect to § 106(c) which have not, but should be, set to rest by this Court. Such problems, where "legislation affect[s] the federal balance," *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2401 (1991), must be resolved by reference to the principle that a "clear and manifest" congressional intent, of which federal courts can be "certain," must be shown. *Id.* The hasty construction of § 106(c), its addition to the Bankruptcy Reform Act as a last-minute floor amendment, *see* 124 Cong. Rec. 32,391, 32,392, 32,394, 32,420, 33,989 (1978), and its opaque language, *see infra* at J1, and sparse legislative history, *see* 124 Cong. Rec. 32,394, 33,993

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Circuit), *filed* July 18, 1991, at 24; Appellant's Reply Brief (Tenth Circuit), *filed* Oct. 16, 1991, at 2-3, and discussed in detail at oral argument, that court offered no reasoning, no authority, and no discussion whatsoever of how § 106(c) could apply to Chapter 12 absent the presence of any of § 106(c)(1)'s "trigger words" in relevant Chapter 12 provisions.

[13] The Chapter 12 provisions regarding the filing of a plan, 11 U.S.C. § 1221, its contents, 11 U.S.C. § 1222, its modification prior to confirmation, 11 U.S.C. § 1223, the confirmation hearing, 11 U.S.C. § 1224, the confirmation, 11 U.S.C. § 1225(a),(b), and discharge, 11 U.S.C. § 1228, contain none of the "trigger words" provided in 11 U.S.C. § 106(c)(1). *See generally infra* at J1-J9 (quoting statutes). While 11 U.S.C. § 1227(a), which provides for the effect of *validly confirmed* plans, does contain the "trigger word" "creditor," that provision is to no avail, since a plan which, *inter alia*, can neither be filed nor confirmed with respect to the interests of a state can have no impact under 11 U.S.C. § 1227.

(1978),[14] have rendered that endeavor a difficult one, as this Court is all too well aware.

Not the least of the interpretive problems is presented by § 106(c)'s proviso: "Except as provided by subsections (a) and (b) of this section . . . ". When § 106 was enacted in 1978, Professor Frank Kennedy of the University of Michigan wrote: "Subsection (c) is subject to subsections (a) and (b) of section 106 *but it is not apparent how these subsections limit the scope of subsection (c).*" Kennedy, *Automatic Stays Under the New Bankruptcy Law*, 12 U. Mich. J.L. Ref. 3, 30 n.120 (1978) (emphasis added). Fourteen years later, we are little further down the interpretive path, with lower federal courts continuing to grapple in inconsistent fashion with § 106(c)'s meaning. *See, e.g.*, Arrow, *Bankruptcy Relief Against Governmental Entities*, 47 Consumer Fin. L.Q. Report ___, ___ n.34 (1993) (in press) (page proofs at 4 n.34) (page proofs lodged with this Court) (citing cases). The proviso remains difficult if not impossible to fathom, either logically or syntactically. Still other interpretive problems, *see, e.g., id.* at ___-___ (page proofs at 3-4), which space and the nature of this Petition do not permit to be explored in detail, persist. The instant case, unlike *Nordic Village* and *Hoffman*, *see supra* at 8, presents this Court with the ability to resolve those issues on a national basis, and thereby to provide lower federal courts – let alone governmental entities potentially subject to § 106(c)'s sweep – with critically needed guidance in this important area of federal law.

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[14] *But cf. Nordic Village*, 112 S.Ct. at 1016 ("if clarity does not exist in . . . [statutory text], it cannot be supplied by a committee report.").

III. THE COURT OF APPEALS' CONCLUSION THAT THE RELIEF AWARDED BELOW WAS PURELY PROSPECTIVE IN NATURE IS IN CONFLICT WITH RELEVANT STANDARDS ESTABLISHED BY THIS COURT.

This issue, which reflects the third Question Presented to this Court, is independent of the first Question Presented, which challenges the ability of federal courts to award *any* form of relief against unconsenting states absent federal delict. The instant issue relates to the independent bar against "raids on the state treasury" established by *Edelman v. Jordan*, 415 U.S. 651 (1974), and its progeny.

A. The Obligation to Recompense the Trust from Funds in the State Treasury is a Creation of both State and Federal Law.

The Oklahoma Constitution provides:

> The principal [of lands and funds granted to the state by the Oklahoma Enabling Act] shall be deemed a trust fund held by the State, and shall forever remain inviolate. It may be increased, but shall never be diminished. *The State shall reimburse said permanent school fund for all losses thereof which may in any manner occur. . . .*

OKLA. CONST. art. XI, § 2 (emphasis added).

That this obligation is a creation of both State and federal law is evidenced both by the Enabling Act itself and by subsequent interpretations of the trust. *See, e.g., Oklahoma Educ. Assoc. v. Nigh*, 642 P.2d 230, 235 (Okla. 1982) ("acceptance provisions of the Oklahoma Constitution and the Enabling Act constitute an irrevocable compact between the United States and Oklahoma, for the benefit of the common schools, which cannot be altered

or abrogated"); *id.* at 235 n.5 (citation omitted) (Oklahoma Enabling Act restrictions "are within the regulating power of Congress, and . . . may not be modified, restricted or changed by an act of the Oklahoma Legislature or . . . amendment of the Oklahoma Constitution); *United States v. Sandoval*, 231 U.S. 28 (1913) (valid conditions imposed by Congress in enabling acts remain in force subsequent to statehood).

B. The Recompense Obligation Moves the Instant Facts Toward the *Edelman v. Jordan* Side, Rather Than the *Ex parte Young* Side, of the Eleventh Amendment "Line."

This Court, having noted that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night," *Edelman*, 415 U.S. at 667, has in subsequent cases taken cognizance of that fact by referring to an "*Ex parte Young* side" and an "*Edelman* side" of the Eleventh Amendment "line." *E.g.*, *Quern v. Jordan*, 440 U.S. 332, 347 (1979). That "line" has roughly corresponded to a line between purely prospective relief (*Young*) and retroactive money damages (*Edelman*).

Of course, should this Court construe the *Edelman* "side" as limited to retroactive money *damages*, then Oklahoma will not prevail on this issue herein: However the relief awarded below is characterized, it most certainly *cannot* be characterized as *damages*, since no *damages* can be awarded absent any legal delict.

But Oklahoma respectfully maintains that this Court has not construed *Edelman* so narrowly. In *Quern*, wherein

"notice relief" which might have led to future expenditures from State coffers was found to be essentially prospective in nature, this Court established the approximate contours of a *Young/Edelman* test.

First, it noted, the State at issue in *Quern* had "made no issue of the incidental administrative expense connected with preparing and mailing the notice," 440 U.S. at 347; by contrast, Oklahoma has objected at every stage herein to the necessity of defending its interests in federal court. *E.g., infra* at C3, B3, A2.

Second, this Court noted the existence of "missing links" in the "chain of causation" to ultimate depletion of state coffers, *Quern*, 440 U.S. at 347, noting that "[t]he mere sending of that notice does not trigger the state administrative machinery." *Id.* at 348. By way of contrast, CLO is required to enforce the Trust by its own constitutional charge. *See Oklahoma Educ. Assoc.*, 642 P.2d 230; *cf. id.* at 238 (absence of legislative power to impede CLO's constitutional mandate). Since the relief awarded below *does* automatically "trigger the state administrative machinery," the chain of causation to depletion of the State treasury *is* unbroken herein.

Third, this Court, in *Quern*, relied on the fact that the depletion *vel non* of the State treasury "rests entirely with the State, its agencies, courts, and legislature, not with the federal court," 440 U.S. at 348. But since the recompense obligation is created by federal as well as State law herein, federal question jurisdiction arises under 28 U.S.C. § 1331.

Thus, the instant question presented involves a situation in which the court of appeals' holding that the relief awarded below was purely prospective in nature, *see infra* at A9-A11, is in conflict with standards established by

this Court in *Quern*, assuming that those standards reflect the current state of the law. Whether or not they do, the instant case presents this Court with the opportunity to provide further national guidance regarding the locus of the *Young/Edelman* "line."

IV. THIS COURT SHOULD REVIEW THE QUESTION WHETHER A FAILURE OF THE NATIONAL POLITICAL PROCESS, JUDICIALLY COGNIZABLE UNDER *SOUTH CAROLINA v. BAKER*, OCCURRED ON THE INSTANT FACTS, AND WHETHER THAT FAILURE IS OF SUFFICIENT MAGNITUDE TO WARRANT TENTH AMENDMENT RELIEF.

Oklahoma argued below, and argues herein, that the Tenth Amendment approach articulated by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), is badly reasoned and unworkable, and should be overruled. It is badly reasoned, Oklahoma maintains, since the "traditional governmental function" analysis which *Garcia* found could not be performed, *see* 469 U.S. at 538-39, is *routinely* performed in the "State action" context. *E.g.*, *Flagg Bros., Inc., v. Brooks*, 436 U.S. 149, 157-58 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974); *Evans v. Newton*, 382 U.S. 296, 302 (1966). Actuality, in short, proves possibility.

Moreover, invoking FEDERALIST No. 43, *Garcia* relied in part on the fact that "the residuary sovereignty of the States [is] implied *and secured* by representation in one branch of the [federal] legislature." 469 U.S. at 552 (emphasis in original). But that rationale was undercut decisively by the adoption of the Seventeenth Amendment more than seventy years prior to *Garcia*.

As a historical matter, *Garcia*'s reliance on the Framers' intent is selective and misdirected. *See, e.g.*, Nagel, *Federalism as a Fundamental Value*, 1981 Sup. Ct. Rev. 81, 88 & n.39, 89 & n.41, 99-103, 107, 109. And as a realistic matter, since the Seventeenth Amendment, not only have practical election realities resulted in the decline in importance of State political parties (which in former times more effectively promoted State interests as such), but the divergent independent constituencies of individual Senators and Representatives have reduced "their tendency to identify with state interests and the positions of state officials." Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 862-63 (1979); *see also id.* at 863-67 (examining other factors); Cantrell, *Restoring the Balance in Federalism*, 10 Okla. City U.L. Rev. 1, 58 (1985) ("The very premises underlying the structure of the political process, as envisioned by the framers, have become increasingly attenuated to the realities of the modern governmental framework.").

In its brief to the court of appeals below, Respondent United States of America stated that "the United States does not necessarily oppose" the reversal of *Garcia*, and a return to the "earlier federalism rationale" of *National League of Cities v. Usery*, 426 U.S. 833 (1976). *See* Brief for the United States, Intervenor-Appellee (Tenth Circuit), *filed* Sept. 19, 1991, at 34 & n.25. In *Garcia*, the United States *opposed* the overruling of *National League of Cities*, concluding that "[t]he basic teaching . . . [of that case] is in harmony with the fundamental principle of federalism embodied in the Constitution and recognized in this Court's decisions in other contexts." Supplemental Brief

for the Secretary of Labor at 8, *Garcia*, 469 U.S. 528 (Nos. 82-1913, 82-1914). Oklahoma fully concurs both in that analysis, and with the United States' further observation that "*National League of Cities* itself rejects the notion that enforcement of federalism restraints is extrajudicial in nature." *Id.* at 14.

Should this Court overrule *Garcia*, Oklahoma argued below and will argue herein that it can establish a Tenth Amendment violation pursuant to the approach defined by this Court in *National League of Cities*, as construed by *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 287-88 (1981).

But even assuming the continued viability of *Garcia*, Oklahoma maintains that a failure in the national political process – which left its interests *as a State* politically isolated and powerless – occurred on the instant facts, and that such a failure is subject to *judicial* relief under premises articulated by this Court in *South Carolina v. Baker*, 485 U.S. 505, 513 (1988). On this point, the court of appeals found that *Baker* "allowed that such a failure might warrant relief under the Tenth Amendment, but articulated no test." *Infra* at A15. While Oklahoma maintains that *Baker* provided sufficient guidance to bring the instant fact within its sweep, the fact that a sophisticated court of appeals could conclude that *there was no test* should amply illustrate the urgent need for further guidance from this Court.

While the court of appeals concluded that the mere fact that 11 U.S.C. § 106(c) was enacted as a last-minute floor amendment (albeit one which affected vital federalism concerns) was insufficient to establish a Tenth

Amendment violation,[15] it utterly failed to come to grips with – let alone acknowledge – the gravamen of Oklahoma's *Baker*-based contention: that only two States (Wyoming and Oklahoma), with a total of *seven* of the 435 members of the House of Representatives, had earmarked farm-loan programs from school-land Trusts. *See* Appellant's Consolidated Opening Brief (Tenth Circuit), *filed* July 18, 1991, at 48-49. The *conjunction* of § 106(c) *with* Chapter 12, Oklahoma argued, worked especially grave hardship on the school land Trusts of those two relatively non-populous States. But the court of appeals below, apparently dismissing this Court's language in *Baker*, 485 U.S. at 513 (State not "deprived of any right to participate in the national political process or . . . singled out in a

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[15] While Oklahoma need not prevail on this point to prevail on its Tenth Amendment argument herein, it *does, inter alia*, directly challenge this conclusion by the court of appeals below. This Court, in various Tenth and Eleventh Amendment contexts, has imposed deliberation-related requirements on Congress prior to its overriding of important and legitimate State concerns. *E.g., Gregory v. Ashcroft*, 111 S.Ct. 2395, 2401 (1991) ("clear and manifest" congressional intent, of which courts can be "certain," required where "legislation affect[s] the federal balance"); *Welch v. State Dep't of Highways*, 483 U.S. 468, 477 (1987) (emphasis added) (abrogation of State jurisdictional immunities permitted "[o]nly when Congress has *clearly considered the problem*"). Oklahoma will maintain that the absence of any meaningful deliberation *whatsoever* regarding § 106(c), *see supra* at 20 (citing legislative history) – with its attendant substantial impact on the federal balance – should *ipso facto* raise justiciable Tenth Amendment concerns. Absent meaningful *notice* of a potential federalism adjustment of the interests of States as States, they could hardly have an opportunity to respond. *See Baker*, 485 U.S. at 513 ("deprived of . . . right to participate in the national political process").

way that left it politically isolated and powerless"), as meaningless *obiter*, concluded that this Court "articulated no test." *See infra* at A15.

Professor Laurence Tribe, observing that "no one expects Congress to obliterate the states, at least in one fell swoop," has concluded: "If there is any danger, it lies in the tyranny of small decisions – in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 381 (2d ed. 1988). The hasty and cavalier enactment of § 106(c), and (should Oklahoma's position with regard to its second Question Presented be rejected) the *sub silentio* application of § 106(c) to Chapter 12, constitute precisely the types of encroachments which Professor Tribe described. Should this Court grant the Writ herein, then Oklahoma will establish, pursuant to *Baker*'s approach, both that it was deprived of any right to meaningfully participate in the national political process to protect its interests *as a State*, and that it was left politically isolated and powerless in that process. But if Oklahoma's analysis is incorrect, or if, as the court of appeals concluded, *Baker*'s language is without force, *and there is no test*, then Oklahoma respectfully submits that that pronouncement should issue from this Court, and the Tenth Amendment, insofar as the application to States of otherwise-generally-applicable laws is concerned, *see supra* at 11 n.5, should not be permitted to be interred in a three-sentence conclusory paragraph by the United States Court of Appeals for the Tenth Circuit. See *infra* at A15.

The fourth Question Presented, in sum, presents this Court with the opportunity to revisit the rationale of *Garcia* should it choose so to do, and if not, to provide

national guidance as to whether *Baker*'s Tenth Amendment language is meaningful in fact, and if so, how.

CONCLUSION

Only federal questions of the greatest importance to American federalism are presented by Oklahoma's Petition herein. Since all facts were stipulated below, and have been undisputed at all stages of the instant litigation, this Court need resolve no factual disputes should it grant the Writ in this case. Oklahoma respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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July 31, 1992

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

IN RE: RANDY L. CROOK and JOHN WEDMAN, Debtors.	No. 91-6204 No. 91-6206 No. 91-6207
STATE OF OKLAHOMA, *EX REL.* COMMISSIONERS OF THE LAND OFFICE, Appellant, v. RANDY L. CROOK and JOHN WEDMAN, Appellees, and UNITED STATES OF AMERICA, Defendant-Intervenor-Appellee.	(Filed May 12, 1992)

CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-90-1654-A, No. 90-1636-A, No. CIV-90-1133-A)

Perry E. Kaufman, Assistant General Counsel, State of Oklahoma, Oklahoma City, Oklahoma (Dennis W. Arrow,

Oklahoma City University School of Law, Oklahoma City, Oklahoma, with him on the brief), for Appellant.

Bruce G. Forrest, U.S. Department of Justice, Washington, D.C. (Stuart M. Gerson, Assistant Attorney General, Washington, D.C., Timothy D. Leonard, United States Attorney, Oklahoma City, Oklahoma, William Kanter, U.S. Department of Justice, Washington, D.C., with him on the brief), for Defendant-Intervenor-Appellee.

John J. Jerome, Milbank, Tweed, Hadley & McCloy, Richard Lieb, Kronish, Lieb, Weiner & Hellman, filed an amicus curiae brief for the Association of the Bar of the City of New York, The Committee on Bankruptcy and Corporate Reorganization.

Before ANDERSON, ALDISERT* and BRORBY, Circuit Judges.

ALDISERT, Circuit Judge.

This appeal by the state of Oklahoma requires us to decide if the bankruptcy court's action in "writing down" a mortgage held by the state of Oklahoma violates the state's sovereign immunity under the Tenth and Eleventh Amendments. Oklahoma holds mortgages on property owned by two debtors in bankruptcy.

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* Ruggero J. Aldisert, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

In reorganization proceedings, the bankruptcy code permits the court to "write down" certain debts, that is, to declare the debt to be secured up to the actual market value of the property, while any additional indebtedness becomes unsecured debt. 11 U.S.C. 506(a).[1] This provision applies against the states. 11 U.S.C. § 106(c). Through the Commissioners of the Land Office, the state appeared specially in the bankruptcy court and argued that the Tenth and Eleventh Amendments to the United States Constitution forbade the court's segregation of the mortgages into secured and unsecured claims.

The bankruptcy court and the district court rejected Oklahoma's contention and reasoned that Congress' Article I bankruptcy power is superior to the state's Tenth and Eleventh Amendment sovereignty. We also reject Oklahoma's contention, but for different reasons. We conclude that the bankruptcy court had the power to write down the mortgages not on the basis of the comparative scope of Congress' Article I power, but rather on the basis of the particular species of relief granted here. The Supreme Court has long held that declaratory or injunctive relief against the states does not touch on the states' constitutional sovereignty, even though this relief results in some incidental expenditure of state funds. The bankruptcy court's order in the present case granted relief of

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[1] Not present here is a liquidation proceeding under Chapter 7. Thus, we are not faced with any problem associated with the teachings of *Dewsnup v. Timm*, 112 S. Ct. 773, 116 L. Ed. 2d 903, 60 U.S.L.W. 4111 (1992). *See In re Bellamy*, No. 91-5045 (2d Cir. April 21, 1992) (1992 WL 78690).

exactly this sort; it did not award money damages. We affirm.

The debtors here sought the protection of the bankruptcy courts under the provisions of Chapter 12, 11 U.S.C. § 1201 et seq., covering family farms. The state argues that the bankruptcy court lacked jurisdiction to dispose of the state's mortgage. The district court's review of the bankruptcy court's final order was proper under 28 U.S.C. § 158(a). A timely appeal was taken, and this court has jurisdiction under 28 U.S.C. § 158(d).

I.

The facts in these consolidated cases are undisputed and identical in all material respects. Wedman and Crook each had mortgaged property to the Commissioners of the Land Office, an agency of the state of Oklahoma. The state foreclosed on the mortgages, and the debtors filed for bankruptcy under Chapter 12. As part of the debtors' reorganization plans, the bankruptcy court applied the provisions of 11 U.S.C. § 506(a):

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

Liens held by the state are also subject to this statutory mandate, by virtue of 11 U.S.C. § 106(c):

> Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity –
>
> (1) a provision of this title that contains "creditor", "entity", of [sic] "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

"Governmental unit" is elsewhere defined to include the states and their departments, agencies and instrumentalities. *Id.* § 101(27). The exceptions set out in subsections (a) and (b) concern offsets and compulsory counterclaims and are not relevant here.

Applying these provisions, the bankruptcy court declared the state's notes to be secured only to the extent of the current market value of the properties; the amount of the debt exceeding the current market value was converted to unsecured debt. The state did not file proofs of claim but appeared specially to contest the bankruptcy court's constitutional authority to exercise jurisdiction over the state's mortgage interests. The court entered orders approving the debtors' reorganization plans, which included the writing down of the state's mortgage notes. These orders were made subject to the state's jurisdictional objection.

The bankruptcy court then consolidated the cases and sat en banc to hear argument on the jurisdictional issue. The state's argument proceeded as follows: under the Oklahoma Enabling Act, Pub. L. No. 59-234, 34 Stat. 267 (1906), Oklahoma received certain lands and funds to be held in trust; the Oklahoma Constitution requires that

the state reimburse the trust in the event of any losses, Okla. Const. art. XI, § 2; the Commissioners of the Land Office invested trust funds in the mortgages involved here; if a portion of the debt is unrecoverable as a result of the bankruptcy court's "write down," the state will be obliged to reimburse the fund out of the state treasury; such a federal court judgment therefore results in "depletion of state coffers through the exercise of unconsented state jurisdiction," Appellant's Br. at 6, and violates the state's sovereign immunity.

The court rejected the state's contentions. First, the court followed *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), in which the Supreme Court held that Congress' commerce power permitted it to abrogate the states' Eleventh Amendment immunity from suit. The bankruptcy court reasoned that, because Article I makes no distinctions between the commerce power and bankruptcy power, the latter also permits Congress to abrogate the states' immunity.

Next, the court noted that abrogation of the states' immunity can only occur by "unmistakably clear" statutory language. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). The court then observed that in *Hoffman v. Connecticut Income Maint. Dept.*, 492 U.S. 96 (1989), the Supreme Court split 4-4 on the question whether Section 106(c) contains such "unmistakably clear" language. The bankruptcy court stepped into the breach and stated that Section 106(c) is "unmistakably clear," and the states therefore are subject to its provisions.

Following this ruling, the orders confirming the reorganization plans became final. The state appealed, and the United States intervened pursuant to 28 U.S.C. § 2403(a) to answer the state's challenge to the constitutionality of Section 106(c). The district court affirmed, employing the same analysis used by the bankruptcy court. The district court also rejected Oklahoma's argument that the bankruptcy court has interfered with the state's sovereign functions in violation of the Tenth Amendment.

The appeal came before this court with the United States briefing and arguing the case for all appellees.

II.

This appeal raises questions of law reviewable *de novo* in this court. *Matter of Tri-State Equip., Inc.*, 792 F.2d 967, 970 (10th Cir. 1986).

III.

Three issues are presented for our consideration: Whether Section 106(c) contains "unmistakably clear" language indicating that Congress meant it to apply against the states, thus abrogating the states' Eleventh Amendment immunity; if so, we must decide whether the Article 1 bankruptcy power authorizes Congress to abrogate the states' Eleventh Amendment immunity and whether the bankruptcy court's determination here violates the Tenth Amendment.

The first issue was addressed by the Supreme Court only two weeks before oral argument in this case. In

United States v. Nordic Village, Inc., 112 S. Ct. 1011, 60 U.S.L.W. 4159 (1992), a corporate officer used corporate funds to pay his individual tax liability to the Internal Revenue Service. The corporation previously had filed for reorganization under Chapter 11, and the trustee in bankruptcy commenced adversary proceedings against the IRS, under 11 U.S.C. § 550(a), to recover the corporate funds paid.

The bankruptcy court ordered the IRS to return the funds, and the district court and court of appeals affirmed. The Supreme Court reversed, stating, "Neither Sections 106(c) nor any other provision of law establishes an unequivocal textual waiver of the Government's immunity from a bankruptcy trustee's claims for monetary relief. . . . Congress has not empowered a bankruptcy court to order a recovery of money from the United States. . . . "

At first blush, this holding may appear to dictate a reversal here. There is, however, a distinction between the bankruptcy proceedings in *Nordic Village* and the bankruptcy proceedings here, a difference that takes this case outside the holding of *Nordic Village* and also forecloses the state's Eleventh Amendment argument entirely. At issue in *Nordic Village* was a claim for monetary damages pressed in adversary proceedings against the government; here we consider declaratory and injunctive relief only. Accordingly, we need not reach the question of the priority between Article I powers and Eleventh Amendment immunity.

The Supreme Court has long recognized that the Eleventh Amendment does not immunize the states from

all judicial actions in federal courts. The foundational case in this area is *Ex parte Young*, 209 U.S. 123 (1908), in which the Court held that the Eleventh Amendment does not bar a federal court injunction to stop state officials from enforcing state laws that violate the United States Constitution.

In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court built on the *Ex parte Young* holding when it considered a private action against the Illinois Department of Public Aid for violations of federal regulations establishing procedures for payment of disability and other benefits. The district court had ordered the state both to follow the federal regulations and to "release and remit . . . benefits wrongfully withheld." *Id.* at 656.

On appeal, the state argued that both forms of relief violated the Eleventh Amendment, because both would require payments from the state's funds; the retroactive award of benefits clearly did, and the prospective order to follow federal regulations would result in additional benefits' being paid as a consequence of the change in procedures. The court of appeals affirmed, and the Supreme Court reversed in part. The Court held that the order to pay past benefits was "indistinguishable in many respected from an award of damages against the State." *Id.* at 668. Such an award infringed on the state's sovereign immunity and was barred by the Eleventh Amendment. *Id.* at 665.

The Court proceeded to hold, however, that the order requiring the state to comply with federal regulations did not violate the Constitution, even though one result would be that the state would pay more benefits in the

future. The Court explained that the potentially problematic rule being enforced had roots deep in Eleventh Amendment jurisprudence:

> As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between night and day. The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. [citing *Graham v. Richardson*, 403 U.S. 365 (1971) (state prohibited from denying welfare benefits on basis of alienage); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (state prohibited from terminating welfare benefits without prior notice and hearing)]. But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*.

Id. at 667-68. Our role is to apply these precepts to the facts before us.

IV.

The relief granted in the present case is declaratory and injunctive in nature. It is not an award of monetary damages. Under Section 362(a) of the bankruptcy code, the filing of the debtors' petitions "operate[d] as a stay, applicable to all entities," of Oklahoma's foreclosure action against the debtors. The bankruptcy court's approval of the debtors' reorganization plans, including the written-down mortgages, took the form of a declaratory order that binds each creditor, including the state. 11 U.S.C. § 1227(a). Discharge under Section 1228 is governed by the general provisions in Section 524(a); discharge "voids any judgment" obtained against the debtor concerning his or her personal liability for debts covered, and "operates as an injunction" against any action to recover on such debts. *Id.* § 524(a).

The Supreme Court has endorsed the view that Section 106(c) by its terms authorizes declaratory and injunctive relief only. In *Hoffman v. Connecticut Income Maint. Dept.*, 492 U.S. 96 (1989), two debtors in bankruptcy brought adversary proceedings against the state in the bankruptcy court to recover monetary relief. One debtor claimed overpayment of taxes and the other claimed Medicaid fees owed for services rendered. The bankruptcy court awarded money judgments on the grounds that Section 106(c) subjected the state to suit and authorized such relief.

Both the district court and the court of appeals held that Section 106(c) did not have this effect, and the Supreme Court agreed. Writing for the plurality, Justice

White noted that Section 106(c)(2) makes the "determination . . . of an issue" binding on the states but does not speak of "claims" or "proceedings" against the states:

> The language of § 106(c)(2) is more indicative of declaratory and injunctive relief than of monetary recovery. The clause echoes the wording of sections of the [Bankruptcy] Code such as § 505, which provides that "the court may determine the amount or legality of any tax," 11 U.S.C. § 505(a)(l), a determination of an issue that obviously should bind the governmental unit but does not require a monetary recovery from a State. We therefore construe § 106(c) as not authorizing monetary recovery from the States. Under this construction of § 106(c), a State that files no proof of claim would be bound, like other creditors, by discharge of debts in bankruptcy, including unpaid taxes, [citations omitted], but would not be subjected to monetary recovery.

492 U.S. at 102. *See also Nordic Village*, 60 U.S.L.W. at 4160. This analysis applies with equal force in the case at bar.

A.

The state argues that any analysis based on *Ex parte Young* and its progeny, which includes *Edelman*, is misplaced because the state has committed no unconstitutional or unlawful act here. Appellant's Br. at 42. In response, we note that any attempt by the state to resume its foreclosure action or otherwise enforce the debtors' obligations in disregard of the bankruptcy stay would constitute a wrongful act of the type contemplated in the teachings of *Ex parte Young*.

The state's argument, however, suffers from a more fundamental infirmity. The line of cases begun in *Ex parte Young* is not concerned so much with righting wrongs as with the relations between sovereigns in our federal system. "[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. at 160).

What the *Pennhurst* court characterized as "[t]his need to reconcile competing interests" of the states and the United States is at the center of the present dispute. A bankruptcy court endeavors to settle the debtors' accounts according to the provisions of federal bankruptcy law. The state endeavors to protect its fiscal interests by putiing its mortgage notes beyond the reach of federal law. That this appeal does not follow an encroachment by the state on federal constitutional or statutory rights is no more than a procedural by-product of the point at which the state chose to challenge the bankruptcy court's order. The issues would be unchanged had the state pressed its foreclosure action and waited for the debtors to use the order as a shield. In either event, federal law is supreme. The bankruptcy court's vindication of the debtors' federal statutory rights accords with Eleventh Amendment jurisprudence.

B.

Oklahoma also argues that this court should oust the bankruptcy court of authority to interfere with the

mortgages held by the state because of the interposition of the Eleventh Amendment as interpreted in *Pennhurst* and *Dugan v. Rank*, 372 U.S. 609, 620 (1963) ("The general rule is that a suit is against the sovereign . . . if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' ") (quoting *Larsen v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949)). Although *Pennhurst* is useful for its general description of the Eleventh Amendment, the case concerned proceedings in federal court against state officials for violations of state law. The Court took care to note that the state's immunity in state-law cases is far broader than in cases where federal law is at issue. 465 U.S. at 105-06. *Dugan* was an action against the federal government and did not raise Eleventh Amendment concerns. 372 U.S. at 610. For the reasons heretofore expressed, we conclude that nothing in *Pennhurst* or *Dugan* affects the reasoning or result we reach here.

V.

The state also argues that the Tenth Amendment bars the relief granted here. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), the Court held that this provision immunizes the states from suit in federal courts to enforce federal statutes that concern "areas of traditional government functions." *Usery* was explicitly overruled in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985). Oklahoma nevertheless argues that this court should follow *Usery*

because it is better reasoned and is likely to rise to new life in the near future. This court, however, must live in the present. The state's arguments here are unavailing.

The state also contends that the passage of Section 106(c) as a "last-minute floor amendment to a less restrictive bill" constitutes an extraordinary failure of the national political process of the sort envisioned in *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). The Court allowed that such a failure might warrant relief under the Tenth Amendment, but the Court articulated no test. *Id.* at 512-13. We do not conclude that the enactment of a floor amendment, a common occurrence in our political system, violates the Tenth Amendment.

VI.

We have considered all the state's arguments, and we find no error in the disposition below. The judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: JOHN WEDMAN, a/k/a JOHN J. WEDMAN, Debtor,	
THE STATE OF OKLAHOMA, *EX REL* THE COMMISSIONERS OF THE LAND OFFICE, Appellant, v. JOHN WEDMAN, a/k/a JOHN J. WEDMAN, et al., Appellees.	No. CIV-90-1636-A No. CIV-90-1133-A (Bankruptcy Case No. 89-3497-LN) (Filed Apr 15, 1991)
IN RE: RANDY L. CROOK, Debtor,	
THE STATE OF OKLAHOMA, *EX REL* THE COMMISSIONERS OF THE LAND OFFICE, Appellant, v. RANDY L. CROOK, et al., Appellees.	No. CIV-90-1654-A (Bankruptcy Case No. 89-3972-LN)

ORDER

The matter before the Court is the Appeal of three consolidated cases from the Bankruptcy Court for the

Western District of Oklahoma by the Appellant State of Oklahoma. Commissioners of the Land Office (hereinafter "the State" or "CLO"), pursuant to 28 U.S.C. § 158(a). Although three cases were consolidated for this appeal, only two debtors are involved: to wit, John Wedman, a/k/a John J. Wedman ("Wedman") and Randy Crook, a/k/a Randy L. Crook ("Crook"). The United States ("U.S.") has also intervened, pursuant to 28 U.S.C. § 2403(a), because the constitutionality of an act of Congress has been challenged.

With the exception of a few factual distinctions, the cases involved here are identical and shall be treated as such throughout the Order. After a careful review of the briefs and the applicable law, this Court finds that the Bankruptcy Court had jurisdiction to confirm the Chapter 12 plans for both debtors, and in so doing to "write-down" the mortgage notes pursuant to 11 U.S.C. § 506(a) ("§ 506(a)"). The Bankruptcy Court is therefore affirmed as to its confirmation of the Chapter 12 plans involved herein.

The pertinent facts as to each debtor are as follows. Wedman owns approximately 300 acres of land in Grant County, Oklahoma, that is subject to a first mortgage held by the State. This mortgage secured a debt of $100,997.11 owed to the State. On March 25, 1988, the State initiated foreclosure proceedings on the debt and the mortgage. On October 18, 1988, judgment was entered for the State and the real property was scheduled for sheriff's sale on June 6, 1989.

One day before the sheriff's sale was to take place, June 5, 1989, Wedman filed a Chapter 12 petition in

bankruptcy. On October 2, 1989, the State filed a Motion to Dismiss and Objection to the Bankruptcy Court's Jurisdiction, which the Bankruptcy Court later denied. The State now appeals that denial.

Crook owns approximately 400 acres of land in Jefferson County, Oklahoma. This land is subject to a first mortgage held by the State, securing a debt of $160,006.96. On July 3, 1986, the State initiated foreclosure proceedings on the debt and the mortgage.

On June 29, 1989, Crook filed a Chapter 12 petition in bankruptcy, which the State subsequently moved to dismiss, on October 2, 1989, for an alleged absence of jurisdiction. The Bankruptcy Court denied the State's Motion to Dismiss by an order dated July 30, 1990, from which the State perfects this appeal.

CLO, acting on behalf of the State of Oklahoma, did not file a proof of claim in any of the three cases before the Court. Hence, the Bankruptcy Court, pursuant to 11 U.S.C. 106(c) ("§ 106(c)"), abrogated the State's immunity and wrote-down the amount of the State's secured claim for both debtors to the actual value of the real property collateral. Additionally, in the Crook proceeding, the Bankruptcy Court extended the time for repayment of the secured claim to thirty (30) years.

CLO claims, in this appeal, that the Bankruptcy Court lacked jurisdiction to write-down the amount of its secured claims with regard to Wedman and Crook, and that it lacked jurisdiction to extend the repayment terms in the Crook bankruptcy. CLO bases these contentions on the fact that it administers the trust of lands and money granted to the State by the United States by virtue of the

Oklahoma Enabling Act, Okl. Const. art. XI, § 1; Act of June 16, 1906, § 7, Pub. L. No. 59-234, 34 Stat. 267, 272.

The beneficiaries of the trust in issue are the State's school children, universities, and public buildings. Okl. Const. art. XI, §§ 2-6. CLO has the power to invest these funds in first mortgages on farmlands within the State, and can foreclose on the mortgages and either sell or "repurchase" the foreclosed property, placing the proceeds back into the trust. *Id.* at § 6.

CLO contends that art. XI, § 2 of the Oklahoma Constitution and the Oklahoma Enabling Act, as interpreted by the Oklahoma Supreme Court, oblige the State to reimburse the trust for any losses, such as a Chapter 12 write-down. *See, Oklahoma Educ. Ass'n. Inc. v. Nigh*, 642 P.2d 230, 235 (Okl. 1982). The write-down is a loss, CLO argues, because CLO has only an unsecured claim for the portion of the debt disallowed by the Bankruptcy Court under § 506(a), which prevents CLO from recovering the full value of the land or "repurchasing" the land.

In its Brief in Chief, CLO objects to the jurisdiction of the Bankruptcy Court, relying upon several legal theories, including the Tenth and Eleventh Amendments to the United States Constitution.[1] CLO's argument is that

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[1] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Congress, acting pursuant to the Bankruptcy Clause[2], lacks the constitutional authority to abrogate the immunity of states from unconsented federal suits. But even if Congress may abrogate state sovereign immunity via the Bankruptcy Clause, CLO avers, Congress has failed to use "unmistakably clear language" in § 106(c) to abrogate the State's sovereign immunity. *See, Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).

Aside from its Eleventh Amendment arguments, CLO also contends that the Tenth Amendment independently bars federal legislation, pursuant to the Bankruptcy Clause, which impairs the sovereignty of the states in areas such as trust administration. CLO also relies upon the Fifth Amendment to assert that the write-down is an unconstitutional taking of property without due process of law. Finally, CLO claims that at the very least, trust law principles ought to prevent the United States, as settlor of the trust, from frustrating CLO as the trustee in the performance of its duties under the trust.

Both debtors and the intervenor, the U.S., dispute the arguments of CLO and claim that Congress has the power, through the Bankruptcy Clause, to abrogate state immunity from federal suit, and that Congress intentionally established this abrogation power in § 106(c). *See also, Hoffman v. Connecticut Dep't of Income Maintenance,*

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[2] The Bankruptcy Clause of Article I § 8, cl. 4 provides:

> The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.

___ U.S. ___, 109 S.Ct. 2818, 106 L.Ed.2d 76 (1989); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). Further, the debtors and the U.S. contend that trust law principles do not apply here, and that retrospective application of Chapter 12 remedies does not violate the Due Process Clause of the Fifth Amendment.

This Court holds that CLO is not immune from the Chapter 12 remedies imposed upon it by the Bankruptcy Court. Chapter 12 does apply to states, even in light of Eleventh Amendment principles, and CLO should comply with the Bankruptcy Court's orders. CLO presented a proposition that *Pennsylvania v. Union Gas Co.* ("*Union Gas*") " . . . is wrongly decided and should be overruled." Not by this Court, which expresses no opinion as to the future of this case.

Additionally, this Court agrees that only law relating to bankruptcy and bankruptcy appeals should apply to the present case; trust law principles have no application here. Finally, the Court finds no violation of the Due Process Clause of the Fifth Amendment in the retrospective application of Chapter 12 principles to loans that were made prior to the enactment of the particular statutory provisions at issue here. Each of these issues will be addressed separately in the remainder of this Order.

I.

The first and most important issue to be addressed in this appeal is whether Congress may abrogate the State's Eleventh Amendment or sovereign immunity through the Bankruptcy Clause. This Court finds that it may.

With regard to this issue, CLO contends that Congress may abrogate, and in fact has abrogated, state sovereign immunity through § 5 of the Fourteenth Amendment[3] and through the Commerce Clause.[4] Nevertheless, CLO contends, the Bankruptcy Clause powers are much narrower than those granted to Congress in either the Fourteenth Amendment or the Commerce Clause, thereby making abrogation of Eleventh Amendment immunity impossible under the Bankruptcy Clause. *See, Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

As was stated CLO also urged the overruling of *Union Gas.* CLO reasons that *Union Gas* is a plurality decision, and the dissenting justices therein now form the "conservative majority" of the Supreme Court. The dissenters in *Union Gas* found that Eleventh Amendment immunity cannot be abrogated pursuant to any Article I power. *Id.* at 2302.

This Court follows the plurality opinion in *Union Gas,* which held that Congress may abrogate Eleventh Amendment Immunity pursuant to the Commerce Clause. *Id.* at 2286. This clarified that *Hans v. Louisiana* did not prevent

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[3] Section 5 of the Fourteenth Amendment provides: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[4] The Commerce Clause of Article I § 8, cl. 3 provides: The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

congressional abrogation of sovereign immunity under Article I, but only prohibited such abrogation pursuant to Article III. *Union Gas* at 2284.

The Commerce Clause and the Bankruptcy Clause are both found in Article I. Additionally, some cases have analogized the two clauses, finding that both recognize the supremacy of federal law over conflicting state laws, while neither precludes the enforcement of *consistent* state laws. *See, International Shoe Co. v. Pinkus,* 278 U.S. 261, 49 S.Ct. 108, 73 L.Ed. 318 (1929); *Service Mach. & Shipbuilding Corp. v. Edwards,* 617 F.2d 70 (5th Cir. 1980).

The connection of the Commerce Clause and the Bankruptcy Clause dates back to the time of the framing of the United States Constitution. This is exemplified by James Madison's statement that the two clauses were "intimately connected." *The Federalist No. 42,* at p. 271 (C. Rossiter ed. 1961). Moreover, a number of Courts of Appeal support congressional abrogation power pursuant to other Article I clauses, or pursuant to Article IV powers. *See, County of Monroe v. Florida,* 678 F.2d 1124 (2d Cir. 1982) (abrogation power exists pursuant to Article IV); *Peel v. Florida Dep't of Trans.,* 600 F.2d 1070 (5th Cir. 1979) (abrogation power exists pursuant to the War Powers Clause). In light of the similarities of the Commerce and Bankruptcy Clauses, as reflected in the above precedents, this Court finds that Congress may abrogate state sovereign immunity through the Bankruptcy Clause. This Court cannot and will not overrule *Union Gas.*

II.

The second issue to be decided herein is whether § 106(c)[5] of the Bankruptcy Code clearly and unmistakably abrogates the states' Eleventh Amendment Immunity. The standard set forth by the United States Supreme Court for abrogation of Eleventh Amendment immunity is that Congress must express its intention to abrogate in "unmistakably clear" language. *Atascadero* at 242. *See also, Welch v. Dep't of Highways*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987).

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[5] Section 106 provides in its entirety:

Waiver of sovereign immunity.

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity –

(1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

CLO contends that the legislative history of § 106(c) and the case of *Hoffman v. Connecticut* make clear that Congress neither clearly considered abrogation nor clearly intended to abrogate state sovereign immunity in § 106(c). CLO further argues that § 106, when read as a whole, allows a state to "waive" sovereign immunity, rather than "abrogating" sovereign immunity, particularly when the state makes a claim in the bankruptcy.

This Court agrees with the position of the debtors and the U.S. that § 106(c)(1) provides, regardless of sovereign immunity, for application of certain Bankruptcy Code provisions to governmental units whenever the "trigger" words "creditor," "entity," and/or "governmental unit" appear. Additionally, a "determination" by a court under a provision containing one of the trigger words "binds" a sovereign. § 106(c)(2).

The action taken by the Bankruptcy Court in this case was to convert the undersecured portion of the State's claim into an unsecured claim, under § 506(a), for both debtors, and to extend the repayment terms for Crook under 11 U.S.C. § 1225(b)(1)(A). We agree with the Appellees' position here as well, that because a § 506(a) action is more declaratory or injunctive in nature, it is a "determination" rather than a "claim" for monetary recovery. As such, the Bankruptcy Court's determination can bind the CLO, notwithstanding the State's asserted sovereign immunity. Moreover, the decision in *Hoffman v. Connecticut* does not prohibit the Bankruptcy Court from binding the State by discharge or write-down of the debt in bankruptcy. *Id.* at 2823.

III.

The third and final issue for disposition on this appeal is whether retrospective application of Chapter 12 remedies effectuates a taking without just compensation, in violation of the Due Process Clause of the Fifth Amendment. According to CLO, a Chapter 12 write-down prohibits the State from collecting in full on its loans to family farmers, and thereby deprives CLO of trust property without due process of law.

The Takings Clause of the Fifth Amendment protects certain rights of secured creditor. *See, Louisville Joint Stock and Bail v. Radford*, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593 (1935). More recent cases have held, however, that the Fifth Amendment only protects the rights of secured creditors up to the value of the collateral or property. *See, United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988); *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273, 61 S.Ct. 196, 85 L.Ed. 184 (1940).

In the present case, the Bankruptcy Court only wrote-down the debt to the value of the collateral for both debtors. Because CLO's rights under the Fifth Amendment are only protected up to the value of the collateral, this Court find [sic] that CLO has not been deprived of property without just compensation, in violation of the [sic] Fifth Amendment due process.

In conclusion, this Court holds that the Bankruptcy Court may abrogate and clearly has abrogated the Eleventh Amendment immunity of CLO, acting on behalf of the State of Oklahoma. Further, this Court finds that the Chapter 12 write-downs herein have not resulted in a

taking of property without due process of law. The Bankruptcy Court's orders as to Wedman and Crook are therefore affirmed, and CLO is hereby directed to comply with those orders.

It is so ordered this 15th day of April, 1991.

/s/ Wayne Alley
WAYNE E. ALLEY
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

In re:	)	
RANDY CROOK a/k/a RANDY L. CROOK,	)	BK. NO. 89-3972-LN
	)	Chapter 12
Debtor.	)	(Filed July 30, 1990)

ORDER ON STATE OF OKLAHOMA, ex rel. COMMISSIONERS OF THE LAND OFFICE OBJECTION TO JURISDICTION

INTRODUCTION

The issue presented in this case is presented in other cases assigned to this court and to the other bankruptcy judges in this district. In the interests of judicial economy, and in order to encourage a uniform approach to the decision, the bankruptcy judges of this district, in the exercise of the inherent power of courts to control their dockets, determined that the issue should be heard *en banc*. On March 30, 1990, an *en banc* hearing was held before the three bankruptcy judges of this district. At the conclusion of the hearing, the matter was taken under advisement.

THE ISSUES

The State of Oklahoma, *ex rel* The Commissioners of the Land Office ("CLO") holds a first mortgage on approximately 400 acres of farmland owned by debtor. Debtor owes CLO approximately $160,000 on his note. On July 3, 1986, CLO initiated foreclosure proceedings on the mortgage note. On June 29, 1989, debtor filed for relief

under Chapter 12 of the Bankruptcy Code.[1] This court, pursuant to §506(a), determined that the value of CLO's secured claim is in the amount of $107,800. Debtor's Chapter 12 Plan seeks to repay CLO's secured claim over thirty years with an interest rate of 8.75 percent. CLO has not filed a proof of claim in debtor's bankruptcy proceeding.

CLO, acting on behalf of the State of Oklahoma, administers the trust of lands and funds granted to the State by the United States through the Oklahoma Enabling Act. Okla. Const. art. XI, §1; Act of June 16, 1906, §7, Pub. L. No. 59-234, 34 Stat. 267, 272. The beneficiaries of this trust are the school children, universities and public buildings of the State. Okla. Const. art. XI, §§2-6. CLO is empowered to invest the school funds in first mortgages on farmlands within the State. *Id.* at §6. If necessary, CLO is authorized to foreclose and either sell or "re-purchase" the foreclosed property, with the proceeds or foreclosed property returned to the trust.

According to CLO, both the Oklahoma Constitution[2] and federal law, as interpreted by the Oklahoma Supreme

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[1] References to statutory provisions by section number only will, unless otherwise noted, be to the Bankruptcy Code, Title 11, United States Code, as amended.

[2] Article XI, §2 of the Oklahoma Constitution provides in pertinent part:

> The principal shall be deemed a trust fund held by the State, and shall forever remain inviolate. It may be increased, but shall never be diminished. The State shall reimburse said permanent school fund for all losses thereof which may occur in any manner, and no portion of said fund shall be diverted for any other use or purpose.

Court,[3] require the State to reimburse the trust for all losses which may occur in any manner. If debtor is allowed to "write down" the mortgage note to any amount less than that currently owing, CLO would have an unsecured claim for the remainder pursuant to §506(a). CLO contends that the State would then be unable to collect the full value of the land or to "repurchase" the land. Therefore, according to CLO, the State would be required to reimburse the trust for all losses resulting from the "write down" of mortgage notes under §506(a).

CLO objects to the jurisdiction of this court, relying on the Eleventh Amendment to the United States Constitution.[4] CLO contends that Congress may not abrogate the Eleventh Amendment immunity of the States in reliance upon the Bankruptcy Clause.[5] Even if Congress has the power to do so, CLO contends that it clearly did not intend §106(c) of the Bankruptcy Code to abrogate the

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[3] In *Oklahoma Educ. Ass'n, Inc. v. Nigh*, 642 P.2d 230, 235 (Okla. 1982) the court stated that the:

> acceptance provisions of the Oklahoma Constitution and the Enabling Act constitute an irrevocable compact between the United States and Oklahoma, for the benefit of the common schools, which cannot be altered or abrogated.

[4] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[5] The Bankruptcy Clause of Article I §8, cl. 4 provides:

> The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.

States' Eleventh Amendment protection. Finally, CLO contends that discharging the unsecured portion of CLO's claim is a taking of property in violation of the Fifth Amendment.[6] Debtor and the United States ("U.S.")[7] responded to CLC's objection.

WHETHER CONGRESS MAY ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY THROUGH THE BANKRUPTCY CLAUSE?

CLO concedes that Congress may abrogate the States' Eleventh Amendment immunity, and has done so pursuant to §5 of the Fourteenth Amendment[8] and to the Commerce Clause.[9] CLO contends that congressional power to abrogate pursuant to §5 of the Fourteenth Amendment and the Commerce Clause, on the one hand, and congressional power to abrogate in reliance upon the Bankruptcy Clause, on the other, are two very different things. CLO argues that the congressional powers granted by §5 of the Fourteenth Amendment and the

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[6] The Fifth Amendment provides in pertinent part: [N]or shall private property be taken for public use, without just compensation.

[7] The United States intervened pursuant to 28 U.S.C. §2403(a), which permits the United States to intervene and present argument in any action where the constitutionality of an act of Congress is challenged.

[8] Section 5 of the Fourteenth Amendment provides: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[9] The Commerce Clause of Article I §8, cl. 3 provides: The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Commerce Clause are substantially more expansive than those granted by the Bankruptcy Clause. CLO also argues that based on the dissent in *Pennsylvania v. Union Gas*, 109 S.Ct. 2273 (1989), four Justices would hold that the States' Eleventh Amendment immunity can not be abrogated pursuant to any Article I powers. CLO further argues that the Commerce Clause powers are fundamentally different from the Bankruptcy Clause powers.[10]

U.S. contends that *Union Gas, supra*, shows that five Justices would hold that Congress may abrogate the States' Eleventh Amendment immunity pursuant to Article I. According to U.S., *Union Gas* makes clear that *Hans v. Louisiana*, 134 U.S. 1 (1890),[11] does not prevent Congress from abrogating State sovereign immunity through the exercise of an Article I power. According to U.S., the plurality opinion of *Union Gas* analogized the Commerce

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[10] According to CLO, these differences are as follows: The Bankruptcy Clause was enacted because of the potential need for interstate uniformity as well as a desire to prohibit Congress from enacting private bankruptcy laws; the Bankruptcy Clause does not effectuate the type of restructuring of our federal system as does the Commerce Clause; the Bankruptcy Clause is not considered a prohibition on State activity in the field; and the Commerce Clause contains "negative implications" which preclude State legislation even absent federal statutes, whereas the Bankruptcy Clause does not contain "negative implications." CLO concludes, based on these crucial distinctions, that the Bankruptcy Clause does not grant Congress the power to abrogate the States' Eleventh Amendment immunity.

[11] *Hans* held that the Eleventh Amendment barred a citizen from bringing suit against his own State in federal court even though the express terms of the Amendment do not so provide.

Clause to the Fourteenth Amendment and found that each provision gives power to Congress while taking power from the States, thus expanding federal power and contracting that of the States. U.S. further argues that the reasoning of *Union Gas* is not limited to the Commerce Clause but applies to each Article I power, including the Bankruptcy Clause. U.S. also argues that the Bankruptcy Clause, like the Commerce Clause and §5 of the Fourteenth Amendment, transfers power to the federal government at the expense of the States. U.S. finally argues that the purpose of the Bankruptcy Clause was to overcome problems arising from inconsistent State treatments of insolvency. U.S. concludes that, as with commerce, there is a need in bankruptcy for uniformity among the States and that therefore Congress may abrogate the States' Eleventh Amendment immunity pursuant to the Bankruptcy Clause.[12]

Debtor's arguments regarding the meaning of *Union Gas* are analogous to those of U.S. Debtor also argues that to sustain CLO's objection would render the Bankruptcy Clause meaningless in any case where the State is a party, because the effect would be to allow the States to preempt federal law on bankruptcy.

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[12] U.S. also refers to courts of appeals cases holding that Congress had the power to abrogate pursuant to other Article I powers or pursuant to an Article IV power. *See County of Monroe v. Florida*, 678 F.2d 1124, 1131-34 (2nd Cir. 1982) (abrogation power exists pursuant to Extradition Clause of Article IV); *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1074-82 (5th Cir. 1979) (abrogation power exists under War Powers Clause); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979) (abrogation power exists under Copyright and Patent Clause).

The Eleventh Amendment implicates the fundamental constitutional balance between the federal government and the States. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). While the immunity of the States from suits in federal courts under the Eleventh Amendment, on its face, appears to be absolute, this constitutional prohibition has been interpreted to be limited by the delegation of powers to Congress in §5 of the Fourteenth Amendment[13] and Article I.[14]

In *Union Gas*, the Court was confronted with two issues. The first was whether the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") permits a suit for monetary damages against a State in federal court. *Id.* at 2277. The second, a constitutional question, was whether Congress may abrogate the States' Eleventh Amendment immunity pursuant to the Commerce Clause. *Id.* at 2277.

In *Union Gas*, the plurality opinion by Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, held that CERCLA permits a suit for monetary damages against a State in federal court. *Id.* at 2286. The plurality then held that Congress may abrogate the States' Eleventh Amendment immunity pursuant to the Commerce Clause. *Id.* The plurality reasoned that the plenary power of the Commerce Clause, like the plenary power of §5 of the Fourteenth Amendment, expands federal power and contracts State power. *Id.* at 2282. The plurality further reasoned that it makes no sense to envision that the

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[13] *Atascadero*, 473 U.S. at 242.

[14] *Union Gas*, 109 S. Ct. at 2286.

power of §5 of the Fourteenth Amendment is an "ultraplenary" power superior to the plenary power of the Commerce Clause. *Id.*

Justice White did not find the "unmistakably clear" language in the statute to show Congress' intent to abrogate the States' Eleventh Amendment immunity, but agreed that Congress may abrogate pursuant to Article I. *Id.* at 2295.

Justice Scalia agreed with the plurality opinion that CERCLA renders the States liable for money damages in private suits. *Id.* at 2295. Justice Scalia then addressed the abrogation issue. Justice Scalia, joined by Justices Rehnquist, O'Connor and Kennedy, found that Congress may not abrogate pursuant to Article I. *Id.* at 2302. Justice Scalia reasoned that to allow Congress to abrogate pursuant to Article I permits Congress to overrule *Hans v. Louisiana, supra. Id.* at 2299.

In finding that Congress may abrogate the States' Eleventh Amendment immunity pursuant to the Commerce Clause, the plurality opinion reasoned that by granting Congress the power to regulate commerce "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." *Id.* at 2281 *citing Employees v. Missouri Dep't of Public Health and Welfare,* 411 U.S. 279, 286 (1973). As the plurality opinion further reasoned, powers granted to Congress do not have a hierarchy, that is, one power is not considered to be plenary and another power considered to be "ultraplenary." *Id.* at 2282. The plurality opinion also reasoned that the important point is "that the provision both expands federal power and contracts state

power." *Id.* The plurality opinion of *Union Gas* and Justice White's opinion, taken together, demonstrate that a majority of the Court concludes that Congress may abrogate the States' Eleventh Amendment immunity pursuant to the commerce power of Article I.

Article I grants to Congress several powers, including the power to regulate commerce and the power to establish uniform laws on bankruptcy. This court recognizes that the breadth and depth of the commerce power is expansive. *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942). However, the expansiveness of the commerce power is not what is important. What is important is the effect on the States' power. *Union Gas*, 109 S.Ct. at 2284. Article I makes no differentiation between the power to regulate commerce and the power to establish uniform laws on bankruptcy. The expansiveness of the commerce power derives from the scope of the area that commerce governs and not from any "ultraplenary" power greater than the power afforded by Bankruptcy Clause. It is this court's view that the Bankruptcy Clause, like the Commerce Clause, grants to Congress the power to abrogate the States' Eleventh Amendment immunity.

WHETHER §106(c) OF THE BANKRUPTCY CODE ABROGATES THE STATES' ELEVENTH AMENDMENT IMMUNITY?

In order to abrogate the States' Eleventh Amendment immunity, Congress must express in the statute its intention to abrogate in "unmistakably clear" language. *Atascadero*, 473 U.S. at 242. CLO argues that Congress did not clearly intend to abrogate the States' immunity in

§106(c),[15] or clearly consider the problem, relying upon the legislative history of §106 and the plurality opinion of *Hoffman v. Connecticut Dep't of Income Maintenance,* 109 S.Ct. 2818 (1989). According to the CLO, the Commission on Bankruptcy Laws proposed a clear and unequivocal abrogation of State immunities, which was rejected. Instead, H.R. 8200 was introduced, which effected abrogation only where the governmental unit filed a proof of claim. Since the present version of §106(c) was proposed after H.R. 8200 and enacted eight years prior to the restructuring of Chapter 12 remedies, CLO concludes that this shows the House of Representatives did not "clearly

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[15] Section 106 provides in its entirety:

> Waiver of sovereign immunity.
>
> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property or the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity –
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

consider" the abrogation issue. CLO also argues that §106 is ambiguous in that it "waives" sovereign immunity and does not "abrogate" sovereign immunity.[16]

U.S. contends that §106(a) and (b) abrogate a States' sovereign immunity only if the State has filed a proof of claim, and that the limiting language of §106(c)[17] applies to instances where the governmental unit does not file a claim. U.S. argues that subsection (c)(1) states that, regardless of sovereign immunity, certain provisions throughout the Bankruptcy Code apply to governmental units whenever the "trigger" words of §106(c)(1), "creditor," "entity," and "governmental unit," appear, and that §506(a) contains such a word. According to U.S., the issue is whether the bankruptcy court's conversion of the undersecured portion of a State's claim into an unsecured claim pursuant to §506(a) is a "determination" which will "bind" a State. U.S. contends that *Hoffman*, resolves this statutory question.[18]

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[16] According to CLO, "waiver" is what a governmental unit may elect to do about its own immunities, while "abrogation" is what a higher sovereign can do to the immunity of a lesser sovereign. CLO concedes that §106 "waives" the "sovereign immunity" of "governmental units," and by cross-reference of §101(26), "governmental units" includes the States, but argues that this cross-referencing is not a clear, unmistakable abrogation required by the Supreme Court.

[17] The limiting language of §106(c) is as follows: "except as provided in subsection (a) and (b) . . . and notwithstanding any assertion of sovereign immunity."

[18] U.S. asserts that Justice White's plurality opinion found that a State would not be liable for monetary recovery unless it

(Continued on following page)

U.S. further argues that CLO's interpretation of §106(c) would lead to discrimination against debtors indebted to States, since the States would be given a more favorable treatment and such debtors would be denied the "fresh start" intended by the Code.

Debtor argues that he is not seeking monetary recovery from the State, but is requesting that the secured claim of the State be valued pursuant to §506(a), and that the term of repayment of the secured claim be extended. According to debtor, this relief falls within the declaratory and injunctive relief allowed under §106(c), and allowed by *Hoffman*.

Debtor further argues that the legislative history of §106(c) supports Congress' intent to subject States to determinations by the Bankruptcy Court because the original proposal waived sovereign immunity to all provisions of the Code, but that the final version waived sovereign immunity to specific Code sections where the "trigger" words appeared.

(Continued from previous page)

filed a proof of claim, but would be bound, like other creditors, by discharge of debts in bankruptcy. *Hoffman*, 109 S.Ct. at 2823. U.S. further states that Justice Marshall's dissent found that the scope of §106(c) is expansive and that a State's sovereign immunity is abrogated whenever one of the "trigger" words appears. *Id.* at 2825-27. According to U.S., §506(a) along with the discharge provisions of the Bankruptcy Code acts as a declaratory judgment as to the amount and the priority of a creditor's claim. U.S. argues that, taken together, the plurality and the dissent show that a majority of the Supreme Court would hold that §106(c) abrogates sovereign immunity for the purpose of "writing down" a secured claim under § 506(a).

In *Hoffman*, the trustee in two unrelated Chapter 7 bankruptcies filed adversary proceedings against the State of Connecticut. The trustee sought to recover payments owed to one debtor in a "turnover" proceeding under §542(b) and a tax payment made by the other debtor as a preference under §547(b). *Hoffman*, 109 S.Ct. at 2821. The State had not filed a claim in either case, therefore, the issue before the Supreme Court was whether §106(c) permits a bankruptcy court to issue a money judgment against a State that has not filed a claim in the bankruptcy proceeding. *Id.* Justice White's plurality opinion, joined by Justices Rehnquist, O'Connor and Kennedy, held that Congress did not in "unmistakably clear" language abrogate the States' Eleventh Amendment immunity by enacting §106(c). *Id.* at 2824. The plurality reasoned that since §106(c)(2) provides that a "determination" by the bankruptcy court of an "issue" . . . "binds governmental units," §106(c)(2) is more indicative of declaratory and injunctive relief. *Id.* at 2823. The plurality further reasoned that §106(c)(2) "echoes the wording of the Code such as §505, which provides that 'the court may determine the amount or legality of any tax' . . . a determination of an issue that obviously should bind governmental unit but does not require a monetary recovery from a State." *Id.* The plurality found that the State would also be bound by the discharge. *Id.*

Justice Scalia's concurrence, joined by Justice O'Connor, found that Congress may not abrogate the Eleventh Amendment immunity pursuant to its Article I powers. *Id.* at 2824. Consequently, Justice Scalia did not decide

whether Congress abrogated the States' Eleventh Amendment immunity in "unmistakably clear" language in §106(c). *Id.*

Justice Marshall's dissent, joined by Justices Blackmun, Brennan and Stevens, held that §106(c) did in "unmistakably clear" language abrogate the States' Eleventh Amendment immunity. *Id.* at 2825. The dissent found that under the plurality opinion the States are given a preferred creditor status and may gain more than their fair share. *Id.* at 2826-27.

According to *Hoffman*, §106(c)(2) prohibits a bankruptcy court from issuing money judgment against a State, where the State has not filed a proof of claim. Also according to *Hoffman*, a State which has not filed a proof of claim is nevertheless bound by the bankruptcy court's determination of tax liability pursuant to §505. The *Hoffman* court found that §505 does not contemplate the awarding of a money judgment. Section 506(a), like §505, allows the bankruptcy court to make a determination of an allowed secured claim and does not contemplate the awarding of a money judgment. Similarly, when the bankruptcy court confirms a plan over the objection of a creditor pursuant to §1225(b)(1)(A) the court is making a determination and does not contemplate the awarding of a money judgment.

In valuing CLO's claim pursuant to §506(a) and confirming debtor's plan over CLO's objection pursuant to §1225(b)(1)(A) this court is making determinations under

provisions of the Bankruptcy Code.[19] Section 106(c) provides that such determinations bind governmental units such as the CLO, "notwithstanding any assertion of sovereign immunity."

It is this court's view that the Eleventh Amendment does not prohibit this court from valuing CLO's secured claim under §506, or changing the terms of the mortgage under §1225(b)(1)(A), as a money judgment is not being issued against CLO. The indirect effect upon CLO of the application of explicit sections of the Bankruptcy Code is not a concern for this court.

WHETHER LIMITING THE STATE TO ITS CHAPTER 12 REMEDIES EFFECTUATES A TAKING OF PROPERTY WITHOUT JUST COMPENSATION?

CLO admits that property may be regulated to a certain extent, but if the regulation goes too far, it will be considered a taking under the Fifth Amendment. CLO argues that Chapter 12 "write downs" are designed to benefit a specific class of private debtors at the expense of Oklahoma's taxpayers. CLO concludes that the "write down" precludes the State from collecting in full on its bona fide loans and is therefore a taking under the Fifth Amendment requiring compensation.

U.S. argues that a "write down" denies an undersecured creditor the possibility of realizing appreciation in the collateral but that this possibility is not "property"

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[19] Sections 506(a) and 1225(b)(1)(A) contain "trigger words" of §106(c)(1) and therefore satisfy the first requirement of §106(c).

under the Taking Clause of the Fifth Amendment. U.S. further argues that the Taking Clause does provide protection to a secured creditor to the extent of the value of the property. U.S. concludes that reducing a mortgagee's security interest to the value of the collateral is not a taking.

Debtor argues that two district courts have held that the "cram down" provisions of Chapter 12 do not violate the Fifth Amendment and requests this court to follow these decisions.

The Takings Clause of the Fifth Amendment does protect certain rights of secured creditors. *See Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 602 (1935). Safeguards are provided to protect the rights of secured creditors to the extent of the value of the property. "There is no constitutional claim of the creditor to more than that." *Wright v. Union Central Life Ins. Co.,* 311 U.S. 273, 278 (1940). More recently, the Supreme Court interpreted the phrase "value of such creditor's interest" of §506(a) as the "value of the collateral." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 372 (1988).

It is this court's view that the Takings Clause of the Fifth Amendment protects an undersecured creditor only to the extent of the value of the collateral and that therefore property has not been taken from CLO in violation of the Fifth Amendment. *See Travelers Ins. Co. v. Bullington,* 878 F.2d 354, 358-60 (11th Cir. 1989); *Dahlke v. Doering,* 94 B.R. 569, 571-73 (D. Minn. 1989); *Albaugh v. Terrill,* 93 B.R. 115, 119 (D. Mich. 1988).

CONCLUSION

This court is authorized to announce that Chief Judge Richard L. Bohanon and Judge John TeSelle concur in the views expressed herein and in the result.

In view of the foregoing, CLO's objection to jurisdiction must be overruled.[20] To the extent that there are other matters as to which disputes exist in this case, the same will be set for hearing upon the request of any party in interest.

IT IS SO ORDERED.

Dated this 30th of July, 1990.

/s/ Paul B. Lindsey
PAUL B. LINDSEY
UNITED STATES
BANKRUPTCY JUDGE

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[20] While it did not enter into this court's decision, it appears that issues arising here are peculiar to the State of Oklahoma because of the State constitutional provisions referred to herein. CLO is a creditor in many of the Chapter 12 cases filed in Oklahoma. In the view of this court, to sustain the position of CLO in those cases would deny this State's family farmers the benefit of the provisions of Chapter 12, and prevent them from obtaining the "fresh start" promised them by the policies underlying the Bankruptcy Code.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	No. BK-89-3972-LN
	)	
RANDY L. CROOK,	)	Chapter 12
	)	
Debtor.	)	(Filed Mar 5, 1990)

ORDER CONFIRMING AMENDED PLAN OF REORGANIZATION

Confirmation of Debtor's Amended Plan of Reorganization was heard on November 29, 1989. Upon representation of counsel and pleadings filed in this proceeding the Court finds and orders that:

1. Notice of the hearing of confirmation and a copy of Debtor's Plan were mailed to all parties listed on the mailing matrix maintained by the Bankruptcy Court Clerk in this case.

2. All objections to confirmation of the Plan have been withdrawn, except the objection to jurisdiction of this Court raised by The State of Oklahoma, *ex rel* The Commissioners of the Land Office.

3. The Plan complies with the provisions 11 U.S.C. Section 1225 and all other Bankruptcy Code provisions which are prerequisite to confirmation of the plan.

4. Except as provided in 11 U.S.C. Section 1228(a) and under the Plan, all property of the estate is vested in the Debtor free and clear of any creditor provided for by the Plan.

5. Treatment of the Bank of Healdton is modified as follows:

The Bank of Healdton

Security: 26 cows and their calves

Secured Claim: $14,656.98

Term of Repayment:

Debtor will reaffirm this note according to its original terms. Under the note, Debtor makes monthly interest payments with the balance due on May 4, 1990. All monthly interest payments will be disbursed directly by Debtor to the Bank.

On May 4, 1990, Debtor shall pay a Trustee fee of $,1319.12. [sic] That amount is the fee on the full amount of Healdton's claim. Any debt paid to Healdton on May 4, 1990, shall be paid through the Standing Chapter 12 Trustee. Any debt renewed by Healdton shall be post-petition debt. That post-petition debt may be paid directly to Healdton and is not subject to the Trustee fee.

The Bank has also issued a $5,000.00 letter of credit on behalf of Debtor as security for Debtor's cattle trading bond. Debtor reaffirms all his obligations relating to that letter of credit.

6. A list of all payments to be made through the Standing Trustee during the term of the Plan is attached.

WHEREFORE, Debtor's Amended Plan of Reorganization is confirmed, subject to this Court's ruling on

whether it has jurisdiction over the State of Oklahoma, *ex rel* Commissioners of the Land Office.

Mar. 2, 1990
Date

/s/ Paul B. Lindsey
UNITED STATES
BANKRUPTCY JUDGE

PREPARED BY:

/s/ Rick Poland
Rick Poland OBA #10929
Underwood, Bardrick, Poland & Snyder
Columbus Square - Suite 302
1001 NW 63rd Street
Oklahoma City, OK 73116
405/843-7877

ATTORNEYS FOR DEBTOR

APPROVED AS TO FORM:

/s/ Stephen W. Elliott
STEPHEN W. ELLIOTT
Pringle & Pringle
2100 Citizens Plaza
Oklahoma City, OK 73118

ATTORNEYS FOR CLO

APPROVED FOR ENTRY:

/s/ J. Dell Gordon
J. DEL. GORDON
Abbott & Gordon
500 Bank of Oklahoma Plaza
Oklahoma City, OK 73102

ATTORNEYS FOR STANDING TRUSTEE

Charles R. Underwood Suite 302 Columbus Square 1001 NW 63rd Street Oklahoma City, Oklahoma 73116	2,550.00
Trustee Fee	1,209.51

August 1, 1991 and 1992

County Treasurer of Jefferson County Jefferson County Courthouse Waurika, Oklahoma 73573	938.89
Internal Revenue Service MAIL STOP 5024 200 NW 4th Street Oklahoma City, Oklahoma 73102	1,346.66
The State of Oklahoma ex rel The Commissioners of the Land Office P.O. Box 26910 Oklahoma City, Oklahoma 783126	10,261.04
The Farmers Home Administration 4434 U.S. Courthouse 200 N.W. 4th Street Oklahoma City, Oklahoma 73102	766.28
Standing Trustee Fee	1,331.28

PAYMENT SUMMARY

January 1, 1990

Standing Trustee Fee (Prepayment)	$ 400.00

March 1, 1990	
Charles R. Underwood Suite 302 Columbus Square 1001 NW 63rd Street Oklahoma City, Oklahoma 73116	1,250.00
Trustee Fee[1]	-0-
May 4, 1990	
Bank of Healdton Healdton, OK 73438	Unknown
Trustee Fee[2]	1,031.62
August 1, 1990	
County Treasurer of Jefferson County Jefferson County Courthouse Waurika, Oklahoma 73573	938.89
Internal Revenue Service MAIL STOP 5024 200 NW 4th Street Oklahoma City, Oklahoma 73102	1,346.66
The State of Oklahoma ex rel The Commissioners of the Land Office P.O. Box 26910 Oklahoma City, Oklahoma 73126	7,902.90
The Farmers Home Administration 4434 U.S. Courthouse 200 N.W. 4th Street Oklahoma City, Oklahoma 73102	700.61

[1] Fee of $112.50 applied to $400 prepayment dated 1-1-90.

[2] Fee on total claim of Healdton is $1,319.12. Deducted from that fee is balance of 1-1-90 administrative fee in the amount of $287.50.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: JOHN WEDMAN a/k/a JOHN J. WEDMAN,	)	Case No. 89-3497-LN
Debtor,	)	(Chapter 12)
	)	(Filed Sep. 11, 1990)

NUNC PRO TUNC ORDER CONFIRMING CHAPTER 12 PLAN

Upon the motion of the State of Oklahoma, *ex rel* the Commissioners of the Land Office (the "CLO"), the Court finds that the CLO's motion for order nunc pro tunc was served on the Debtor, and the Standing Trustee in accordance with the Court's Order Limiting Notice. The Court further finds that the Debtor and the Standing Trustee have consented to the entry of this Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that CLO's Motion for Nunc Pro Tunc Order is granted and that the Order Confirming Chapter 12 Plan entered on April 11, 1990, is amended insofar as its approval and entry by this Court is made subject to the CLO's jurisdictional objection.

9-11-90

/s/ Paul B. Lindsey
UNITED STATES
BANKRUPTCY JUDGE

APPROVED FOR ENTRY:

/s/ Steven J. Goetzinger
STEVEN J. GOETZINGER, OBA #10313
PRINGLE & PRINGLE
A Professional Corporation
1601 Northwest Expressway, Suite 1200
Oklahoma City, Oklahoma 73118
(405) 848-4810

ATTORNEYS FOR STATE OF OKLAHOMA, *EX REL*
COMMISSIONERS OF THE LAND OFFICE

/s/ Rick G. Poland
RICK G. POLAND
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ATTORNEY FOR THE DEBTOR, JOHN WEDMAN

/s/ J. Dell Gordon
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Oklahoma City, Oklahoma 73102

ATTORNEY FOR JACK CORNELIUS,
STANDING CHAPTER 12 TRUSTEE

205.04/P12

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

In re:	)	BK 89-3497-LN
John J. Wedman,	)	Chapter 12
	)	
Debtor.	)	(Filed Apr. 12, 1990)

ORDER CONFIRMING CHAPTER 12 PLAN

The Chapter 12 Plan filed in this case, including modifications, came on for confirmation hearing before this Court pursuant to notice of the time, place and purpose of such hearing given all parties in interest. Upon consideration of the evidence before the Court and the arguments and representations of counsel, the Court makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This Chapter 12 plan complies with the provisions of Chapter 12 and with other applicable provisions of the Bankruptcy Code.

2. The fees, charges or amounts required under Chapter 123 of Title 28, United States Code, or by the Plan, to be paid before confirmation, have been paid.

3. The Plan has been proposed in good faith and not by any means forbidden by law.

4. The value, as of the effective date of the Plan, of property to be distributed under the plan on account of each allowed unsecured claim is $8,961.00. That amount is not less than the amount that would be paid on such

claim if the debtor estate were liquidated under Chapter 7 of the Bankruptcy Code on such date.

5. Each holder of an allowed secured claim has accepted the plan, or, if not, the Plan provides that the holder of such secured claim will retain the lien securing such claim and the value, as of the effective date of the Plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim or the property securing such claim has been surrendered to such holder.

6. The Debtors will be able to make all payments under the plan and to comply with the Plan.

ORDER

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

7. Pursuant to 11 U.S.C. §1227, all property of the debtor estate is vested in Debtors subject to liens for allowed secured claims as specified in Debtors' plan.

8. Upon completion of all payments required under the plan, except payments provided for under 11 U.S.C. §1222(b)(5) and 11 U.S.C. §1222(b)(9), Debtors shall receive a discharge of all debts provided for by the plan except those debts provided for under 11 U.S.C. §1222(b)(5), 11 U.S.C. §1222(b)(9), and 11 U.S.C. §523.

9. The Plan and its modifications, if any, is confirmed.

It is further ORDERED, ADJUDGED AND DECREED that:

10. Within ten days after the entry of this Confirmation Order, Debtors will file with the Clerk of this Court and serve on all parties in interest a copy any modifications of the Chapter 12 Plan made at the hearing on confirmation which have not been previously reduced to writing and filed with the Court. Any party may object to the modifications within five days after service of the modifications. Modifications to the Plan are effective as of the date of this Order.

11. Attached hereto is the list of plan payments including the creditors' names and addresses, the amount of each payment, the date of each payment, the date the first payment by Trustee is due and the date last payment by Trustee is due. To the extent they represent liquidation value, Debtors' payments to unsecured creditors made subsequent to the date of entry this order will bear interest at the rate of 8.5%. Any party objecting to said schedule of payments may do so within five days of entry of this order.

12. On the anniversary of confirmation of the plan and during the term of the plan, Debtors will pay to the Trustee the their [sic] actual disposable income or the amount of disposable income projected in Debtors' plan, not to exceed the total of allowed unsecured claims and trustee fees thereon. If the term of the plan expires prior to payment of disposable income for the final year of the plan, such payment shall be made within 15 days from the date the term the plan expires. Except as allowed pursuant to Bankruptcy Code §1228(b), Debtors will not receive a discharge until the final payment under this paragraph has been made to the Trustee.

13. Debtors will file with the Trustee and deliver to other interested parties who request the same, quarterly income and expenses statements accounting for all income and expenditures. Such accounting will be submitted by the Debtors to the Trustee with copies to the other interested parties by the 15th day of the month following the quarter in which such expenditures and/or income were made.

14. Provisions in the Plan canceling or voiding liens or mortgages of creditors shall become effective only upon the discharge of debtors pursuant to Bankruptcy Code §1228.

15. Other than in the ordinary course of business, the Debtors may not purchase equipment, land or incur any other substantial capital expense without the written consent of the Trustee.

16. All payments to creditors pursuant to the plan will be made by Debtors to the Trustee. If the Debtors make any such payment directly to a creditor, the Trustee shall be entitled to compensation according to the statutory percentage in effect on the date of the payment. The Trustee shall disburse plan payments to creditors pursuant to 11 U.S.C. §1222 and §1226(c).

17. Debtors will pay the Trustee an administrative fee upon all payments under the plan at the percentage set by the Attorney General pursuant to 28 U.S.C. §586(e), effective on the date of the payment. Said fee shall be imposed on Debtors in addition to payments to secured and unsecured creditors. To the extent disposable income payments to the Trustee exceeds the amount which would be received by unsecured creditors in a chapter 7

liquidation, the Trustee will deduct from such excess the statutory fee and remit the balance to unsecured creditors.

18. Debtors will make payments to the Trustee in cash, cashier's check or certified check. If such payments to the Trustee are made by other forms of negotiable instruments, the Trustee may withhold payments to creditors for sufficient time to allow the Trustee to negotiate and collect the instrument. Unless the intended recipient of any payment to the Trustee is specifically designated, the Trustee may in his discretion apply payments (net of the Trustee's statutory fee) to the oldest outstanding payment due to any allowed creditor under the plan. If the case of partial payment to the Trustee, the Trustee may apply it (net of the Trustee's statutory fee) to any such creditor.

19. If any plan payment to the Trustee is not delivered to the Trustee on its due date, this case will be dismissed, unless this case is converted by the Debtors to a chapter 7 proceeding, a hearing on dismissal is requested by the debtors or the Trustee is notified by the Debtors of a need for extension of time. Upon notice from the Debtors, the Trustee may extend the payment due date for a period not to exceed 10 days.

Date: APR 11 1988.

/s/ Paul B. Lindsey
Paul B. Lindsey
United States Bankruptcy Judge

Approved for Entry:

/s/ J. Dell Gordon
J. Dell Gordon OBA 3470
of ABBOTT & GORDON, Lawyers
Bank of Oklahoma Plaza, Suite 500
Oklahoma City, OK 73102
(405) 232-2166

Attorneys for Trustee Cornelius

PAYMENT SCHEDULE

December 15, 1989

Charles R. Underwood 320 Columbus Square 1001 N.W. 63rd Street Oklahoma City, Oklahoma 73116	1,000.00
Standing Trustee (includes $300 prepayment)	400.00

August 1, 1990

County Treasurer of Grant County Grant County Courthouse Watonga, Oklahoma 73772	821.29
The Farmers Home Administration United States Attorney 4434 U.S. Courthouse 200 N.W. 4th Street Oklahoma City, Oklahoma 73102	8,834.96
The Commissioners of the Land Office Box 26910 Oklahoma City, Oklahoma 73126	7,247.79

Internal Revenue Service 200 N.W. 4th Oklahoma City, Oklahoma 73102	414.34
James M. Rodgers P.O. Box 514 Blackwell, Oklahoma 74631	670.84
Charles R. Underwood (Estimated) 302 Columbus Square 1001 N.W. 63rd Street Oklahoma City, Oklahoma 73116	2,700.00
Unsecured Creditors	
Liquidation Value	3,509.00
Trustee Fee ($300 prepayment deducted)	2,004.00

August 1, 1991 and 1992

County Treasurer of Grant County Grant County Courthouse Watonga, Oklahoma 73772	821.29
The Farmers Home Administration United States Attorney 4434 U.S. Courthouse 200 N.W. 4th Street Oklahoma City, Oklahoma 73102	10,421.66
The Commissioners of the Land Office Box 26910 Oklahoma City, Oklahoma 73126	8,549.49
Internal Revenue Service 200 N.W. 4th Oklahoma City, Oklahoma 73102	469.64

James M. Rodgers P.O. Box 514 Blackwell, Oklahoma 74631	760.33
Unsecured Creditors	
Liquidation Value	3,509.00
Trustee Fee	2,371.00
October 15, 1990, 1991 and 1992	
Unsecured Creditors	
Disposable Income	Unknown

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

In Re:	)	Case No. BK-89-3972-LN
RANDY L. CROOK,	)	(Chapter 12)
	)	
Debtor.	)	(Filed Nov. 29, 1989)

STIPULATION

COME NOW the Debtor, Randy L. Crook ("Crook,"), and The State of Oklahoma, *ex rel* Commissioners of the Land Office (the "CLO"), and stipulate as follows:

The CLO contends and its witness would testify that the following amounts are due and payable to the CLO from Crook and that the exhibits hereto, which are incorporated herein by reference, are true and correct copies of the notes and mortgages executed by Crook and held by the CLO:

1. Note #CS100828655, which is dated December 28, 1981, and is in the face amount of $81,500.00:

Principal and interest payoff as of 8-15-89	$146,201.72
Attorneys' fees per Note	23,392.28
Abstract fees	232.00
Total payoff as of 8-15-89	$169,826.00
Per diem after 8-15-89	$35.3941

A copy of the foregoing note is attached hereto as Exhibit "A".

2. Mortgage dated December 28, 1981, which secures Note CS100828655 and is attached hereto as Exhibit "B".

3. Note #CS750775584, which is dated May 4, 1978, and is in the face amount of $10,000.00:

Principal and interest payoff as of 8-15-89	$ 13,805.24
Attorneys fees per note	1,380.52
Total payoff as of 8-15-89	$ 15,185.86
Per diem after 8-5-89	$2.5684

A copy of the foregoing note is attached hereto as Exhibit "C".

4. Mortgage dated May 4, 1978, which secures Note #CS750775584 and is attached hereto as Exhibit "D".

By this Stipulation, the parties intend that the exhibits attached hereto shall be admitted into evidence for all purposes at the hearing on confirmation of Crook's Chapter 12 plan of reorganization without objection and without the need for a witness to authenticate the same. The parties further intend that the various amounts stated herein shall be taken as evidence for all purposes in said confirmation hearing as though a witness on behalf of the CLO testified to the same at said confirmation hearing.

By entering into this Stipulation, Crook is not agreeing that the amounts stated herein are, in fact, due and payable from him to the CLO, but only that a witness on behalf of CLO would testify such amounts are due and payable from him.

Further, this Stipulation is being entered into by the CLO in support of its objection to jurisdiction. Nothing herein shall be construed as a consent to the jurisdiction of a Federal Court or waiver of any immunity available pursuant to the Constitution of the United States or applicable law.

IT IS SO STIPULATED.

DATED this 29 day of November, 1989.

/s/ R Poland
Rick Poland
Underwood, Bardrick, Poland
& Synder
Columbus Square
Suite 302
1001 N.W. 63rd St.
Oklahoma City, Oklahoma 73116

ATTORNEYS FOR RANDY L. CROOK

/s/ S W E
Stephen W. Elliott, OBA# 2685
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A Professional Corporation
1601 N.W. Expressway
Suite 2100
Oklahoma City, Oklahoma 73118
(405) 848-4810

ATTORNEYS FOR THE STATE OF OKLAHOMA, *EX REL* COMMISSIONER OF THE LAND OFFICE

205.03/P3

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

In Re:	)	Case No. BK-89-03497-LN
JOHN WEDMAN, a/k/a JOHN J. WEDMAN,	)	(Chapter 12)
Debtor.	)	(Filed Nov. 29, 1989)

STIPULATION

COME NOW the Debtor, John Wedman ("Wedman"), and The State of Oklahoma, *ex rel* Commissioners of the Land Office (the "CLO"), and stipulate as follows:

The CLO contends and its witness would testify that the following amounts are due and payable to the CLO from Wedman and that the exhibits hereto, which are incorporated herein by reference, are true and correct copies of the notes and mortgages executed by Wedman and held by the CLO:

I. Note #CS8507470, which is dated July 31, 1980, and is in the face amount of $70,200.00:

Principal and interest payoff as of 7-1-89	$100,997.11
Attorneys' fees	2,500.00
Abstract fees	188.00
Service of Process	76.51
Total payoff as of 7-1-89	$103,761.62
Per diem after 7-1-89	$18.8456

A copy of the foregoing note is attached hereto as Exhibit "A".

II. Mortgage dated July 31, 1980, which secures Note CS8507470 and is attached hereto as Exhibit "B".

By this Stipulation, the parties intend that the exhibits attached hereto shall be admitted into evidence for all purposes at the hearing on confirmation of Wedman's Chapter 12 plan of reorganization without objection and without the need for a witness to authenticate the same. The parties further intend that the various amounts stated herein shall be taken as evidence for all purposes in said confirmation hearing as though a witness on behalf of the CLO testified to the same at said confirmation hearing.

By entering into this Stipulation, Wedman is not agreeing that the amounts stated herein are, in fact, due and payable from him to the CLO, but only that a witness on behalf of CLO would testify such amounts are due and payable from him.

Further, this Stipulation is being entered into by the CLO in support of its objection to jurisdiction. Nothing herein shall be construed as a consent to the jurisdiction of a Federal Court or waiver of any immunity available pursuant to the Constitution of the United States or applicable law.

IT IS SO STIPULATED.

DATED this 29th day of November, 1989.

/s/ Rick Poland
Rick Poland
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& Synder
Columbus Square
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Oklahoma City, Oklahoma 73116

ATTORNEYS FOR JOHN WEDMAN

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ATTORNEYS FOR THE STATE OF
OKLAHOMA, *EX REL*
COMMISSIONER OF THE LAND
OFFICE

205.04/P2

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, art. III. sec. 2. Para. 1

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, and Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

UNITED STATES CONSTITUTION, amend X

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

UNITED STATES CONSTITUTION, amend, XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 106

§ 106. Waiver of sovereign immunity

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity –

(1) a provision of this title that contains "creditor," "entity," or "governmental unit" applies to governmental units; and

(2) A determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. § 1221

§ 1221. Filing of plan

The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if an extension is substantially justified.

11 U.S.C. § 1222

§ 1222. Contents of plan

(a) The plan shall –

(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and

(3) if the plan classifies claims and interests, provide the same treatment for each claim or interest within a particular class unless the holder of a particular claim or interest agrees to less favorable treatment.

(b) subject to subsections (a) and (c) of this section, the plan may –

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;

(2) modify the rights of holders of secured claims, or of holders of unsecured

claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;

(5) provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) subject of section 365 of this title, provide for the assumption, rejection or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(7) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(8) Provide for the sale of all or any part of the property of the estate or the distribution of all or any part of the property of the estate among those having an interest in such property;

(9) provide for payment of allowed secured claims consistent with section 1225(a)(5) of this title, over a period exceeding the period permitted under section 1222(c);

(10) Provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; and

(11) include any other appropriate provision not inconsistent with this title.

(c) Except as provided in subsections (b)(5) and (b)(9), the plan may not provide for payments over a period that is longer than three years unless the court for cause approves a longer period, but the court may not approve a period that is longer than five years.

11 U.S.C. § 1223

§ 1223. Modification of plan before confirmation

(a) The debtor may modify the plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1222 of this title.

(b) After the debtor files a modification under this section, the plan as modified becomes the plan.

(c) Any holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection.

11 U.S.C. § 1224

§ 1224. Confirmation hearing

After expedited notice, the court shall hold a hearing on confirmation of the plan. A party in interest, the trustee, or the United States trustee may object to the confirmation of the plan. Except for cause, the hearing shall be concluded not later than 45 days after the filing of the plan.

11 U.S.C. § 1225

§ 1225. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if –

(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 23, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan –

(A) The holder of such claim has accepted the plan;

(B)(i) The plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period, or such longer period as the court may approve under section 1222(c), beginning on the date

that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended –

(A) for the maintenance or support of the debtor or a dependent of the debtor; or

(B) for the payment of expenditures necessary for the continuation, preservation, and operation of the debtor's business.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

11 U.S.C. § 1228

§ 1228. Discharge

(a) As soon as practicable after completion by the debtor of all payments under the plan, other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(10) of this title, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan allowed under section 503 of this title or disallowed under section 502 of this title, except any debt –

(1) provided for under section 1222(b)(5) or 1222(b)(10) of this title; or

(2) of the kind specified in section 523(a) of this title.

(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if –

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1229 of this title is not practicable.

(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt –

(1) provided for under section 1222(b)(5) or 1222(b)(10) of this title; or

(2) of a kind specified in section 523(a) of this title.

(d) On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if –

(1) such discharge was obtained by the debtor through fraud; and

(2) the requesting party did not know of such fraud until after such discharge was granted.

(e) After the debtor is granted a discharge, the court shall terminate the services of any trustee serving in the case.

FILED
OCT 6 1992
OFFICE OF THE CLERK

No. 92-911

In the Supreme Court of the United States

OCTOBER TERM, 1992

COMMISSIONER OF THE LAND OFFICE, OF OKLAHOMA, PETITIONER

v.

RANDY L. CROOK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
WILLIAM KANTER
BRUCE G. FORREST
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether 11 U.S.C. 506(a), which authorizes bankruptcy courts to "write down" the amount of a creditor's secured claim, applies to secured claims held by petitioner, a state entity.

2. Whether it violated the Tenth or Eleventh Amendments to the United States Constitution for the bankruptcy court to "write down" the value of petitioner's secured claims.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-211

COMMISSIONER OF THE LAND OFFICE, OF OKLAHOMA, PETITIONER

v.

RANDY L. CROOK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 966 F.2d 539. The opinions of the district court (Pet. App. B1-B12) and the bankruptcy court (Pet. App. C1-C17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1992. The petition for a writ of certiorari was filed on August 3, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of the bankruptcy proceedings of respondents Randy L. Crook and John Wedman. Crook and Wedman borrowed money from petitioner, an entity of the State of Oklahoma, and secured their loans with mortgages on their farm properties. Crook and Wedman filed for protection under Chapter 12 of the Bankruptcy Code (Code), 11 U.S.C. 1201 *et seq.*, when petitioner began foreclosure proceedings under the terms of their mortgages. See Pet. App. B2-B3.[1]

As part of their reorganization effort, debtors sought to have the amount of petitioner's secured claims adjusted pursuant to the so-called "write down" provision of the Code. 11 U.S.C. 506(a); see also 11 U.S.C. 103(a) (applying provisions of Chapter 5 of the Code to Chapter 12). Under Section 506(a), certain allowed claims of a creditor are deemed to be secured claims up to the value of the property securing the debt, and unsecured claims in the amount that the claim exceeds the property's value.[2]

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[1] Chapter 12 of the Code applies to reorganizations of family farms. In most substantive respects, Chapter 12 parallels the relief available to an individual or business debtor under Chapter 11.

[2] Under Section 506(a), the remaining unpaid debt would be unsecured and paid, along with other unsecured debts, *pro rata*, in a reorganization plan. If the debtor successfully complies with the payment requirements made under a confirmed plan, unsecured debts not paid under the plan may, with certain exceptions, be discharged. 11 U.S.C. 1228.

Under 11 U.S.C. 1222(b)(2), the Code allows the reorganization plan to "modify the rights of holders of secured claims." Similar powers to adjust the liens related to allowed claims are set forth in the other reorganization chapters of the Code. See 11 U.S.C. 1123(b)(1) and 1322(b)(2). That relief is not available to debtors in liquidation proceedings. Cf. *Dewsnup* v. *Timm*, 112 S. Ct. 773 (1992); Pet. App. A3 n.1.

Petitioner, the State of Oklahoma, *ex rel.* the Commissioners of the Land Office,[3] contested the exercise of bankruptcy jurisdiction over its secured claims. Petitioner argued that the Bankruptcy Code did not authorize the court to exercise jurisdiction with respect to the State's loans. Petitioner also argued that any action by the bankruptcy court affecting its claims would violate the State's sovereign immunity from federal court jurisdiction under the Eleventh Amendment, and would also violate the State's sovereignty as preserved by the Tenth Amendment. The United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of 11 U.S.C. 106(c), the Code provision dealing with waivers of sovereign immunity.

Sitting en banc, the bankruptcy court in the Western District of Oklahoma rejected petitioner's claims in their entirety, holding that Section 106(c) of the Code brought petitioner's secured claims within the scope of the debtors' bankruptcy cases and that the statute was constitutional. Pet. App. C1-C15. Subsequently, the bankruptcy court issued orders confirming reorganization plans that decreased petitioner's secured interest in both debtors' farm properties and changed the terms of the mortgage obligations. *Id.* at D1-F8. Petitioner appealed to the district court, which affirmed the rulings of the bankruptcy court. *Id.* at B1-B12.

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[3] We note that the State of Oklahoma is not a party in this litigation, but rather appears *ex relatione* for the Commissioners of the Land Office. The State's Land Office comes within the definition of governmental entity under the Code. See 11 U.S.C. 101(27) (Supp. III 1991) (defining governmental units to include a "department, agency, or instrumentality of * * * a State." 11 U.S.C. 101(27) (Supp. III 1991). We also note that the lower courts properly treated the bankruptcy court's orders as running against the individual Commissioners of the Land Office, and not the State, *eo nomine*. Petitioner has not contended otherwise in this Court.

2. The court of appeals affirmed. Pet. App. A1-A15. The court of appeals held that Section 106(c) of the Code authorized the bankruptcy court to "write down" the value of petitioner's secured claims and to take other action that affected the value of those claims. Pet. App. at A8, citing *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992). That action did not constitute an award of money damages, but rather was akin to declaratory and injunctive relief. The court of appeals held that such remedies are available against state officials under *Ex parte Young*, 209 U.S. 123 (1908), and *Edelman* v. *Jordan*, 415 U.S. 651 (1974), without implicating the State's sovereign immunity under the Eleventh Amendment. Pet. App. A8-A10.[4] The court therefore found it unnecessary to consider whether Congress's Article I bankruptcy power, see U.S. Const. Art. I, § 8, Cl. 4, permitted it to abrogate the States' Eleventh Amendment immunity.

Turning to petitioner's Tenth Amendment claim, the court of appeals rejected petitioner's suggestion that it disregard this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Pet. App. A14-A15. The court also rejected petitioner's argument that its challenge to the validity of 11 U.S.C. 106(c) was justiciable because that statute was enacted

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[4] The court of appeals rejected petitioner's argument that the rule of *Ex parte Young*—that declaratory and injunctive relief against state officers acting in their official capacity does not implicate the Eleventh Amendment—does not apply in this case because petitioner is not accused of any federal "delict." The court noted that "any attempt by the state to resume its foreclosure action or otherwise enforce the debtors' obligations in disregard of the bankruptcy stay would constitute a wrongful act of the type contemplated in the teachings of *Ex parte Young*." Pet. App. A12.

as the result of an extraordinary failure of the national political process. Pet. App. A14-A15.

ARGUMENT

The decision of the court of appeals is correct in all respects, and does not conflict with any decision by this Court or any other court. Further review is therefore unwarranted.

1. Section 106(c) of the Code, 11 U.S.C. 106(c), details the circumstances in which the determinations of a bankruptcy court bind a governmental unit (defined in 11 U.S.C. 101(27) (Supp. III 1991) to include States) that has not consented to the court's jurisdiction by filing a claim against the debtor. That provision states:

> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. 106(c).[5] Thus, by its plain language Section 106(c)(2) mandates that governmental units are bound by determinations of issues arising under provisions of the

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[5] Subsections (a) and (b) of Section 106 deal with the States' liability for monetary relief in bankruptcy court, and limit its availability to circumstances in which the debtor has a compulsory counterclaim to a claim of a governmental unity (Section 106(a)), or as an offset to an allowed claim of a governmental unit (Section 106(b)). See *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992); *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 101-102 (1989) (plurality opinion).

Code containing the so-called trigger words "creditor," "entity," or "governmental unit[s]" contained in Section 106(c)(1). See *Hoffman*, 492 U.S. at 101 (plurality opinion).

Although petitioner notes that this Court's decisions in *Hoffman* and *Nordic Village* did not resolve all of "the interpretive issues surrounding" Section 106(c) (Pet. 18), petitioner points to no issue of statutory interpretation raised in this case that merits this Court's review. Petitioner does not dispute that, if Section 106(c) is not to be rendered meaningless, it must mean at minimum that Code sections containing the trigger words apply to governmental units, and that the bankruptcy courts may therefore issue orders affecting the interests of States so long as they do not award monetary relief. See *Hoffman*, 492 U.S. at 102 (Section 106(c)'s language "is more indicative of declaratory and injunctive relief") (plurality opinion); *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015-1016 (1992); *Neavear* v. *Schweiker (In re Neavear)*, 674 F.2d 1201 (7th Cir. 1982).[6] And petitioner cites no decision from this or any other court that would call into question the applicability of Section 106(c) to the circumstances of this case.

Petitioner does contend (Pet. 19) that Section 106(c) requires the presence of its trigger words—"creditor," "entity," or "governmental unit"—before a Code provi-

[6] The Court in *Nordic Village* did not find it necessary to construe Section 106(c) with respect to non-monetary relief against governmental units (there, the United States), because the issue was not presented. See 112 S. Ct. at 1016. Petitioner has not, however, offered any reading of Section 106(c) that would not authorize, at minimum, the bankruptcy courts to write down the claims of governmental units and confirm plans affecting their claims. Accordingly, there is no basis for the Court to review the theoretical issues relating to Section 106(c) raised in the petition. See Pet. 20-21.

sion is made applicable to the States. Petitioner further contends, however, that Chapter 12 of the Code contains none of the trigger words and that Section 106(c) therefore does not apply in Chapter 12 cases. Although we have no quarrel with the proposition that Code provisions must contain trigger words to be applicable to the States, there is no doubt that the provision at issue in this case contains the requisite trigger words. Petitioner's claim is therefore without merit.

First, petitioner errs in suggesting that Chapter 12 of the Code contains no trigger words. Section 1227, 11 U.S.C. 1227, specifically states that "the provisions of a confirmed plan bind * * * each creditor." In light of that language, it is plain that a governmental unit that is a creditor in a bankruptcy is bound by the terms of a confirmed plan of reorganization under Chapter 12. Thus, the bankruptcy court's orders confirming the debtors' plans fully bind petitioner.[7] Second, in determining whether a Code provision applies to governmental units, this Court has not focused generally on the Chapter under which the bankruptcy case is proceeding, but rather on the particular Code section at issue. Thus, the Court in *Hoffman* did not search Chapter 7 of the Code for trigger words; rather, the Court noted that Section 542(b) and Section 547(b), the two provisions that were

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[7] Petitioner argues (Pet. 20 n.13) that Section 1227's use of the trigger word "creditor" has no effect on the State because it applies only to validly confirmed plans of reorganization. The statute provides, however, that plan confirmation binds each creditor "whether or not the claim of such creditor * * * is provided for by the plan, and whether or not such creditor * * * has objected to, has accepted, or has rejected the plan." 11 U.S.C. 1227. Thus, a plan may be validly confirmed, and bind all creditors—a term that unquestionably includes States—to its terms, regardless of whether the creditors have participated in the bankruptcy process.

asserted to apply to the State in that case, contained the trigger word "entity." See *Hoffman*, 492 U.S. at 101 (plurality opinion); 492 U.S. at 107-110 (Marshall, J., dissenting). Likewise, in *Nordic Village*, in discussing the applicability of Section 106(c), the Court focused not on the Chapter of the Code involved, but on the provisions under which the claim at issue was brought against the government. See *Nordic Village*, 112 S. Ct. at 1015-1016. In this case, the provision at issue is 11 U.S.C. 506(a), which authorized the bankruptcy court to "write down" petitioner's secured claim; that provision contains the trigger word "creditor" and therefore applies to petitioner.

2. Petitioner contends that, notwithstanding Section 106(c), the Eleventh Amendment bars any order by the federal courts that would affect its mortgage rights. The court of appeals properly concluded, however, that the Eleventh Amendment is not implicated in this case because the court's action did not have the effect of awarding retrospective monetary relief against the State. Pet. App. A8-A12.

a. This Court's cases have long maintained the distinction, for Eleventh Amendment purposes, between retrospective monetary relief and prospective declaratory relief. See, *e.g.*, *Ex parte Young*, 209 U.S. 123 (1908); *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Quern* v. *Jordan*, 440 U.S. 332 (1979). The "write down" of the loans in this case did not have the effect of ordering monetary relief of any sort against the State. The bankruptcy court merely adjusted the future terms of petitioner's claims against the debtors. Moreover, even if the order caused some expenditure of funds, that is consistent with the established principle that prospective equitable relief may have an ancillary effect on a State's finances without running afoul of the Eleventh

Amendment. See *Edelman*, 415 U.S. at 667-668; *Quern*, 440 U.S. at 347-348.

Petitioner nonetheless argues (Pet. 22-24) that, because state law requires it to repay any shortfall in the loans it makes to the state permanent school fund, the orders in this case will have the inevitable effect of causing the State to expend funds. That effect, petitioner argues, is direct rather than ancillary, and therefore barred by the Eleventh Amendment. Petitioner's claim does not warrant this Court's review.

First, it is speculative to suggest that any shortfall requiring repayment to the state school fund will occur, since the reorganization plans in this case provide for full repayment of the principal amount of petitioner's loans to the debtors. See Gov't C.A. Br. 7-8. Moreover, even assuming that petitioner is correct that some shortfall will occur and that it will have to repay that amount to the school fund, that will be the result of state law, and not any order of the federal court. And even if that occurs, economic reality rather than any order of the bankruptcy court will have been the cause. The only reason that the value of petitioner's mortgage was subject to being "written down" by the bankruptcy court was that petitioner was owed more than the market value of debtors' properties; thus, even if the State had succeeded in foreclosing on debtors' mortgages and selling their properties, there still would have been a shortfall between the amount petitioner was owed and the amount it collected. Thus, even if petitioner is correct that it will be required to repay the school fund the amount of any shortfall, the bankruptcy court's order cannot plausibly be viewed as creating that obligation. As this Court stated in *Quern*, petitioner's argument fails because "the chain of causation which petitioner seeks to establish * * * contains numerous missing links, which can

be supplied, if at all, only by the State * * * and not by a federal court." *Quern*, 440 U.S. at 347.[8]

In any event, petitioner's fact-specific claim does not present any legal issue that requires this Court's attention. Petitioner merely asserts a misapplication of *Quern* and *Edelman* to the facts of this case.[9]

b. Petitioner contends (Pet. 12-17) that *Ex parte Young*, which makes state officials subject to suit in federal court for declaratory relief stemming from violations of federal law, is inapplicable for another reason. Petitioner argues that *Ex parte Young* permits federal court jurisdiction only if there is an existing federal "delict" on the part of the state officers. Because petitioner had not yet violated any federal laws when the bankruptcy petitions were filed in this case, petitioner argues that there was no basis for declaratory or injunctive relief against the State.

As the court of appeals recognized, however, the filing of the debtors' voluntary bankruptcy petitions created an "automatic" stay pursuant to 11 U.S.C. 362(a), after

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[8] Petitioner argues (Pet. 22-24) that the repayment obligation is created by federal law, because Oklahoma's enabling act prevents it from altering its trust obligation to the school fund. That claim is unpersuasive. Although the Supremacy Clause may bar the State from extinguishing its trust obligation, a substantive question relating to the circumstances in which the repayment obligation is triggered would present primarily issues of state law. In any event, we do not see how the nature of the bankruptcy court's order can change depending upon the impact it may have on a creditor's obligation to make up a bad debt to a third party.

[9] Indeed, to the extent that petitioner presents any legal issue for review, it is the unprecedented claim that a federal court order is barred under the Eleventh Amendment because it may someday cause one state agency to pay funds to another state agency because of the operation of state law. Petitioner cites no authority to support that claim, which is, in any event, based on the peculiarities of Oklahoma state law.

which any foreclosure or other efforts to enforce the terms of debtors' loans would have been a violation of federal law. Pet. App. A12-A13. *Ex parte Young* does not require that a federal court refrain from exercising jurisdiction until there is an existing violation of federal law. Rather, it is sufficient if there is an imminent threat to an interest protected by federal law. See *Ex parte Young*, 209 U.S. at 159-167.[10]

Petitioner relies on this Court's decision in *Cory* v. *White*, 457 U.S. 85 (1982), for the proposition that a federal "delict" is a necessary predicate to jurisdiction founded on *Ex parte Young*. *Cory* involved competing claims by California and Texas that both had jurisdiction to tax the estate of Howard Hughes; each State's argument was based on the claim that Hughes was domiciled there at the time of his death, a question of state law. The estate's executor filed a federal interpleader action against the taxing officials of each State, seeking to have the competing States' claims against the estate resolved in one proceeding.[11] This Court held that the Eleventh Amendment barred the action, because there was no issue of federal law in the case. Relying on its decision in *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292 (1937),

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[10] In this case, we note that the protection afforded to the debtors by the automatic stay was crucial. Both debtors filed their petitions for bankruptcy relief after the State had pursued foreclosure proceedings. Pet. App. B2-B3. Indeed, debtor Wedman filed for bankruptcy the day before a sheriff's sale of his land was scheduled to take place. *Id.* at B2.

[11] Under the federal interpleader statute, 28 U.S.C. 1335, a party may bring adverse claimants to a single fund into federal court to have their competing claims resolved in one proceeding, provided that there is diversity of citizenship between at least two adverse claimants. In *Cory*, the executor claimed that the taxing officials of California and Texas were diverse parties. See 457 U.S. at 87-88.

the Court rejected the argument that *Ex parte Young* and *Edelman* v. *Jordan* permitted declaratory or injunctive actions to be brought against state officers in any circumstances. 457 U.S. at 89-91.

Cory provides no support for petitioner, because in that case both States could have taxed the Hughes estate without implicating any issue of federal law. See 457 U.S. at 89-91.[12] In this case, by contrast, the court of appeals was correct to conclude that any action by petitioner to enforce its rights against debtors would have been squarely foreclosed by the automatic stay provision of 11 U.S.C. 362(a). Moreover, the administration of the debtors' estates under the Code, and the confirmation of their reorganization plans, were obviously accomplished pursuant to federal law. As the court of appeals recognized, "[t]hat this appeal does not follow an encroachment by the state on federal * * * rights is no more than a procedural by-product of the point at which the state chose to challenge the bankruptcy court's order. The issues would be unchanged had the state pressed its foreclosure action and waited for the debtors to use the order as a shield." Pet. App. A13.[13]

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[12] Petitioner suggests (Pet. 15 n.9) in passing that one of the States in *Cory* may not have had a sufficient constitutional nexus to tax the estate. No party claimed as much in that case, and that possible federal issue went unmentioned by this Court. To the contrary, this court relied on *Worcester County Trust Co.*'s statement that no issue of federal law would be raised if each State taxed the estate for its conclusion that federal law was not implicated by the competing claims to the Hughes estate. See *Cory*, 457 U.S. at 89.

[13] Because the court of appeals correctly concluded that Oklahoma's Eleventh Amendment immunity was not implicated in this case, the issue of congressional power to abrogate state sovereign immunity pursuant to the Bankruptcy Clause, U.S. Const. Art. I, § 8, Cl. 4, is not presented.

3. Finally, petitioner contends (Pet. 25-30) that this Court's review is warranted to determine whether Section 106(c) violated the State's sovereignty as protected by the Tenth Amendment. See *New York* v. *United States*, 112 S. Ct. 2408, 2417-2419 (1992). Under this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the protection of the States' sovereign interests as reflected in the Tenth Amendment is a matter ordinarily to be resolved through the political process without intervention of the federal courts. The Court has recognized, however, that "some extraordinary defects in the national political process might render congressional regulation of state activities invalid." *South Carolina* v. *Baker*, 485 U.S. 505, 512 (1988). Petitioner contends that this case presents such a situation.[14]

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[14] Petitioner also argues (Pet. 25-27) that review should be granted in this case for the purpose of reconsidering and overruling *Garcia*, and reinstating the doctrine of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Contrary to petitioner's assertion, this case does not present an appropriate vehicle for doing so. Under *National League of Cities*, a federal law was subject to invalidation on Tenth Amendment grounds only if (1) the challenged statute regulated the "States as States"; (2) the federal statute addressed matters that were attributes of state sovereignty; and (3) the States' compliance with the federal law directly impaired the States' ability "to structure integral operations in areas of traditional government functions." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-288 (1981). Petitioner cannot meet any of these criteria with respect to Section 106(c). The Bankruptcy Code does not regulate the States as States; the ability of the States to foreclose on defaulted loans of family farmers is not a traditional governmental function; and, even if it were, the availability of bankruptcy relief does not significantly impinge on the ability of States to operate a loan program. Indeed, petitioner's farm loan program was abolished a decade ago, see *Oklahoma Education Ass'n* v. *Nigh*, 642 P.2d 230 (Okla. 1982), and it is therefore difficult to understand how the Bankruptcy Code as presently

Petitioner argues (Pet. 27-28) that Section 106(c) had a particularly deleterious effect on Oklahoma and Wyoming, because those States, which between them had only seven seats in the House of Representatives when the statute was enacted, are the only ones that had farm loan programs using education trust funds that were subject to being written down under the Code. Petitioner argues that the inability of Oklahoma and Wyoming to protect their interests in the political process warrants judicial intervention on Tenth Amendment grounds. Petitioner's Tenth Amendment claim does not warrant this Court's review.

Petitioner offers no reason to think that Section 106(c) or any other provision of the Code was directed at the interests of Wyoming and Oklahoma in particular. Section 106(c) does not discriminate by its terms between any governmental unit; it applies equally to all States and the United States. Petitioner cites nothing in Section 106(c)'s legislative history to support the proposition that the statute was targeted specially at Wyoming and Oklahoma's farm lending schemes. Finally, there is no basis for petitioner's assertion that Section 506(a)—which applies to claims of all creditors generally—works any particular hardship on those States.[15]

In any event, even if petitioner's Tenth Amendment claim had arguable merit, review by this Court at this

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enacted imposes on the State's sovereign function of operating such a program.

[15] Moreover, the impression conveyed by petitioner that Section 106(c) was some sudden, unthoughtful invention is incorrect. The need for a provision addressing the States' sovereign immunity was recognized by the Commission on Bankruptcy Laws five years before the Code was enacted, and the matter received extensive consideration by both houses of Congress. See *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. at 111-113 (Stevens, J., dissenting).

time would be highly premature. Petitioner cites no case, from any court, that calls into question the constitutionality of the Bankruptcy Code on Tenth Amendment grounds. To the contrary, the federal bankruptcy system has proven to be workable, and has not impaired the ability of the States to fulfill their sovereign role in our federal system. See, *e.g.*, *In re Locarno*, 23 Bankr. 622, 625-626 (Bankr. D. Md. 1982); *In re Erlin Manor Nursing Home, Inc.*, 86 Bankr. 307, 311-312 (D. Mass. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1992

STATE OF OKLAHOMA, COMMISSIONERS OF THE LAND OFFICE,

Petitioner,

v.

RANDY L. CROOK
and
JOHN WEDMAN
and
UNITED STATES OF AMERICA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

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I. IDENTITY OF PETITIONER FOR ELEVENTH AMENDMENT PURPOSES

In its Brief in Opposition, the United States notes in passing that "the State of Oklahoma is not a party in this litigation, but rather appears *ex relatione* for the Commissioners of the Land Office." Brief for the United States in Opposition at 3 n.3. What legal conclusion – if any – is to be drawn by this Court from that observation is unstated. But if the United States intends any implication that the Commissioners of the Land Office [CLO] and the State are distinguishable for Eleventh Amendment purposes herein, such a view would be manifestly incorrect.

The Eleventh Amendment bars unconsented federal jurisdiction not only over States, but State agencies and departments as well. *E.g., Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984). This Court has drawn the relevant distinction between state "political subdivisions," which receive no Eleventh Amendment protection, and "arms," "departments," or "instrumentalities" of the State, which do. *E.g.,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 176 n.22 (2d ed. 1988).

CLO is clearly an instrumentality of the State of Oklahoma. The grantee of the lands and moneys provided by Congress in the Oklahoma Enabling Act was the State. Act of June 16, 1906, § 7, Pub. L. No. 59-234, 34 Stat. 267, 272. *Cf.* OKLA. CONST. art. XI, § 1 (acceptance of grant as *State;* faith of *State* pledged to preserve corpus of grant). Moreover, all three specific criteria established by this Court for the satisfaction of Eleventh Amendment-protected status are met herein. First, while this Court has looked to the existence *vel non* of legislative control in

drawing the "political subdivision"/"State instrumentality" distinction, *e.g., Lake Country Estates v. Tahoe Regional Planning Auth.*, 440 U.S. 391, 402 (1979), CLO, and authorization for legislative rules and regulations, were constitutionalized at statehood. OKLA. CONST. art. VI, § 32. Second, while this Court has looked to the level of government (State or local) which has traditionally performed the function in question, *Lake Country Estates*, 440 U.S. at 402, administration of State lands has traditionally been a State function. Third, this Court has looked to the ability of the entity in question to levy taxes or incur bonded indebtedness on its own. *E.g., Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274, 280 (1977). CLO has no such authority. In consequence, CLO and Oklahoma are legally indistinguishable for Eleventh Amendment purposes.

II. MISCHARACTERIZATIONS OF OKLAHOMA'S ANALYSIS OF 11 U.S.C. § 106(c)

While Oklahoma will, should this Court grant the Writ herein, vigorously dispute the United States' interpretations of 11 U.S.C. § 106(c) and a number of this Court's Tenth and Eleventh Amendment decisions, it is well aware that such argumentation is inappropriate in this Reply.

But in two areas, both relating to the dispute concerning the meaning and applicability of 11 U.S.C. § 106(c), the United States, in its Brief in Opposition, has mischaracterized Oklahoma's analysis as presented in its Petition. Petitioner Oklahoma will therefore attempt to briefly correct and clarify the record in these two respects.

First, the United States asserts:

> *Petitioner does not dispute* that, if Section 106(c) is not to be rendered meaningless, it must mean at a minimum that Code sections containing the trigger words apply to governmental units, *and that the bankruptcy courts may therefore issue orders affecting the interests of States so long as they do not award monetary relief.*

Brief for the United States in Opposition at 6 (emphasis added). The assertion is incorrect.

Apart from the other arguments proffered by Oklahoma relating to Section 106(c) in its Petition, see Petition for Certiorari at 18-21, the central focus of Oklahoma's argumentation relating to Oklahoma's first Question Presented, see *id.* at 12-17 was that this Court's caselaw, *e.g.*, *Cory v. White*, 457 U.S. 85 (1982), precludes the exercise of *any form of* unconsented federal jurisdiction (injunctive *or* monetary) over a State *which is not and cannot be alleged to be in violation of federal law.* Thus, Oklahoma *has* manifestly and vigorously disputed – in the record – "that the bankruptcy courts may . . . issue orders affecting the interests of States so long as they do not award monetary relief."[1]

---

[1] On a closely related matter, the United States also asserts:

> *Petitioner has not, however, offered any reading of Section 106(c)* that would not authorize, at a minimum, the bankruptcy courts to write down the claims of *governmental units* and confirm plans affecting their claims.

Brief for the United States in Opposition at 6 n.6 (emphasis added). That assertion is misleading.

First, "governmental units," as defined in 11 U.S.C. § 101(27), are not fungible for Eleventh (or Tenth) Amendment

Second, the United States asserts:

> And *petitioner cites no decision from this or any other court* that would call into question the applicability of Section 106(c) to the circumstances of this case.

Brief for the United States in Opposition at 6 (emphasis added).

If the United States means by that statement that *pursuant to the United States' interpretation* of cases such as

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purposes. While Petitioner does not dispute (and, indeed, would have no standing to dispute) the applicability of 11 U.S.C. § 106(c), in various circumstances, to "governmental entities" *which are not States* [nor does it, contra to the United States' implication, *see* Brief for the United States in Opposition at 15, proffer any wholesale challenge to the "constitutionality of the Bankruptcy Code . . . "], the essence lies in the detail of Oklahoma's analysis of 11 U.S.C. § 106(c) *insofar as States are concerned*. Thus, again contra to the United States' assertion, *see* Brief in Opposition at 6 n.6, the instant case presents concrete issues, not "theoretical" ones, to this Court.

Second, as this Court is aware, definitive interpretation of 11 U.S.C. § 106(c) has yet to be achieved, almost fifteen years after its enactment. *See, e.g., United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015-16 (1992). As this Court is also aware, both space limitations in, and the nature of certiorari petitions do not provide a forum for lengthy exegeses of potential interpretive approaches to complex (and, in the instant case, paradoxically worded) statutes. But at the Court of Appeals level (and to the extent permitted by space limitations in that forum), Oklahoma *did* tender a rather detailed and systematic approach to interpreting 11 U.S.C. § 106(c), pursuant to which bankruptcy relief would be unavailable herein, but pursuant to which that provision would not be rendered meaningless. See Appellant's Consolidated Opening Brief (Tenth Circuit), *filed* July 18, 1991, at 26-30. Petitioner Oklahoma wishes to respectfully call that portion of the record to the attention of this Court.

United States v. Nordic Village, Inc., 112 S.Ct. 1011, 1015-16 (1992), *South Carolina v. Baker*, 485 U.S. 505, 513 (1988), *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11, 102 (1984), *Cory v. White*, 457 U.S. 85, 88-91 (1982), and *Quern v. Jordan*, 440 U.S. 332, 347-348 (1979), Section 106(c) is fully applicable to the facts of this case, then no further clarification is required. But if the United States means that Petitioner Oklahoma has cited no authority in support of its theory that "call[s] into question the applicability of Section 106(c) to the circumstances of this case," then Oklahoma respectfully calls to the attention of this Court the fact, which this Court will discover, that these cases – and more – are invoked by Oklahoma in its Petition for precisely that conclusion. See Petition for Certiorari *passim*.

CONCLUSION

Oklahoma respectfully prays that this Court issue the Writ herein.

Respectfully submitted,

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